# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1951

## No. 317

DAY-BRITE LIGHTING, INC., APPELLANT,

*vs.*

STATE OF MISSOURI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED SEPTEMBER 12, 1951.

PROBABLE JURISDICTION NOTED NOVEMBER 5, 1951.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1951

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[fol. 1] [File endorsement omitted]

**IN THE SUPREME COURT OF MISSOURI, OCTOBER TERM, 1951.**

STATE OF MISSOURI, Appellee,

vs.

THE DAY-BRITE LIGHTING, INC., Appellant

PRAECIPE FOR TRANSCRIPT—Filed August 14, 1951

To the Honorable the Clerk of the Supreme Court of Missouri:

In compliance with Rule 10 of the Rules of the Supreme Court of the United States, you are hereby requested properly to certify the following matters and things of record in the above entitled cause for filing with the Clerk of the Supreme Court of the United States, upon appeal taken from the Supreme Court of Missouri, to said Court:

1. This Praecipe.

2. The Transcript of Record of the proceedings in the lower court, filed in the Supreme Court.

3. Argument and submission of above entitled cause to Division 1 of the Supreme Court of Missouri.

4. The decision and judgment of Division 1 of the Supreme Court of Missouri, affirming the judgment of the lower court, with opinion filed.

(Note: The opinion of Division 1 of the Supreme Court of Missouri was adopted as the opinion later delivered by the Supreme Court en banc on the 12th day of June, 1951. It is therefore, suggested that it is unnecessary to certify both opinions, it being sufficient that the opinion en banc is certified. We suggest the following entry:

[fol. 1a] "The opinion by Division 1 of the Supreme Court of Missouri was adopted by the Supreme Court en banc as its opinion on June 12, 1951, a copy of which opinion is hereinafter certified.")

5. Filing of motion for rehearing in Division 1 and also filing of motion to transfer said cause to the Court en banc.

6. Action of the Court in overruling the motion for a rehearing and in sustaining the motion to transfer the cause to the court en banc.

7. Argument and submission of the cause to the Supreme Court en banc.

8. Judgment and decision by the Supreme Court en banc, including certified copy of the opinion by that court and also including the dissenting opinions filed at the same time by Judges Vandeventer and Hyde.

9. Filing by Appellant of motion for a rehearing in the Supreme Court en banc.

10. Action by the court en banc in overruling said motion for a rehearing.

11. Action by the Supreme Court in sustaining Appellant's motion to stay the mandate.

12. Petition for appeal to the Supreme Court of the United States, with record entry of filing.

13. Appellant's Bond on Appeal and approval by the court, with record entry of filing.

14. Appellant's assignments of error.

15. Appellant's jurisdictional statement.

16. Appellant's general statement.

17. Citation.

18. Order allowing appeal.

19. Statement of service of copies of petition for appeal, [fol. 1b] assignments of error, jurisdictional statement, general statement, citation, and order allowing appeal, upon the Appellee by the Appellant.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri; Cobbs, Blake, Armstrong, Teasdale & Roos, Thomas H. Cobbs, Robert E. Blake, Henry C. M. Lamkin, by Henry C. M. Lamkin, Attorneys for Appellant.

[fol. 1c] [Caption omitted]

[fols. 2-3] [Caption omitted]

[fol. 4] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

STATE OF MISSOURI, Plaintiff,

vs.

DAY BRITE LIGHTING, INC.

Charged With Violation of Section 11,785 R. S., Missouri, 1939, "Employees to Be Allowed Four Hours to Vote, Etc."

INFORMATION—June 24, 1947

Jasper R. Vettori, Associate Prosecuting Attorney, of the St. Louis Court of Criminal Correction, now here in Court, on behalf of the State of Missouri, information makes as follows:

That Day Brite Lighting, Inc., a corporation in the City of St. Louis, on the 5th day of November, 1946, being a day set aside for the holding of an election in said City and State, and being then and there the employer of Fred C. Grotemeyer, who was a person entitled to vote at said election, did wilfully and unlawfully fail and refuse to allow the said Fred C. Grotemeyer, their employee, to absent himself from his employment for a period of four hours between the times of the opening and closing of the polls, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

Count II

That the Day Brite Lighting, Inc., a corporation, in the City of St. Louis, on the 5th day of November, 1946, being a day set aside for the holding of an election in said City and State, and being then and there the employer of Fred C. Grotemeyer, who was a person entitled to vote at said election, and who was entitled to absent himself from his work and employment for a period of four hours between the times of opening and closing of the polls without penalty [fol. 5] of deduction of wages because of the exercise of

such privilege, did wilfully and unlawfully penalize the said Fred C. Grotemeyer, their employee, by deducting from his salary the amount of his eranings for the time he was absent from his work, in the exercise of such privilege, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

Jasper R. Vettori, Associate Prosecuting Attorney of the St. Louis Court of Criminal Correction.

*Duly sworn to by Jasper R. Vettori. Jurat omitted in printing.*

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[fol. 6] In the St. Louis Court of Criminal Correction

Warrant

The State of Missouri to the Sheriff of the City of St. Louis, Greeting:

We Command You to take Day Brite Lighting Inc., a corporation if he be found in your bailiwick, and Said Corporation safely keep, so that you have Said Corporation's body before the St. Louis Court of Criminal Correction, forthwith, then and there to answer a complaint made against Said Corporation for violation of Section 11,785 R. S. Missouri (1939) "Employees to be allowed four hours, etc." which more fully appears by the foregoing affidavit, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State; and have you then and there this writ, with your return thereon how you executed the same.

Witness, Erwin Stoecklin, Clerk of the said Court with the seal hereto affixed, at office, in the City of St. Louis, this 15th day of June in the year of our Lord nineteen hundred and forty seven.

(Signed) Erwin Stoecklin, Clerk. (Seal.)

[fols. 7-8] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

ORDER SETTING CAUSE FOR TRIAL—June 23rd, 1949

Now, on this day, the mandate and opinion of the St. Louis Court of Appeals reversing the judgment of Conviction of the defendant, under the first count of the information, and reversing the Judgment quashing and dismissing the second count of the information and remanding the cause for trial on the second count, received and filed. Cause set for trial July 11, 1949. Supoenas to issue.

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[fol. 9] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

DEFENDANT'S MOTION TO QUASH THE INFORMATION—Filed July 6, 1949

Comes now the defendant, Day-Brite Lighting, Incorporated, a corporation, by Louis J. Portner & Cobbs, Logan, Roos & Armstrong its attorneys, and moves the Court to quash Count 2 of the information filed herein, Count 2 being the only count now pending against this Defendant, and for grounds for said motion states and alleges as follows:

1. That the acts of this Defendant, as alleged under Count 2 in the information filed herein, do not constitute a violation of any section of the laws of the State of Missouri and in particular, Section 11785 of the Revised Statutes of Missouri for 1939.

2. That the facts stated under Count 2 in the information filed herein do not constitute an offense under the laws of the State of Missouri and in particular, Section 11785, Revised Statutes of Missouri 1939.

3. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939, will, under Count 2 of said information,

deprive this Defendant of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

4. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the State of Missouri in that the enforcement of the statute sought to be enforced by the information herein—namely Section [fol. 10] 11785, R. S. Mo. 1939, will, under Count 2 of said information, deprive this defendant of his property without due process of law in violation of Section 10 of Article I of the Constitution of Missouri for 1945.

5. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the State of Missouri in that the enforcement of the statute sought to be enforced by the information herein, namely, Section 11785 R. S. Mo. 1939, will, under Count 2 of said information constitute the taking of private property for private use in violation of Section 28 of Article I of the Constitution of Missouri for 1945.

6. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that the enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939 will, under Count 2 of said information, deny to this defendant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

7. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the State of Missouri in that the enforcement of the statute sought to be enforced by the information herein—namely Section 11785, R. S. Mo. 1939 will, under Count 2 of said information, deny to this Defendant equal protection of the laws in violation of Section 14 of Article I of the Constitution of Missouri for 1945.

8. That said Section 11785, R. S. Mo. 1939 is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that the enforcement of said statute under Count 2 of said information will impair the obligation of contract in violation of Section 10, Article I of the Constitution of the United States.

9. That said Section 11785, R. S. Mo. 1939 is invalid and unconstitutional and contrary to the provisions of the Con-
[fol. 11] stitution of the State of Missouri in that the enforcement of said statute under Count 2 of said information will impair the obligation of contract in violation of Section 13, Article I of the Constitution of Missouri for 1945.

10. That said Section 11785, R. S. Mo. 1939 is invalid and unconstitutional under Section 28, Article IV of the Constitution of Missouri for 1945, in that the bill introduced and passed by the legislature and signed by the Governor, and the amendment to said bill likewise introduced and passed by the legislature and signed by the Governor, of which this said statute formed a part, contained more than one subject and the various subjects therein contained were not clearly expressed in the title of either said bill or said amendment thereto in that Section 11785 R. S. Mo. 1939 under which this prosecution is brought was enacted by the 39th General Assembly of the State of Missouri as House Bill No. 273 Laws of Missouri for 1897 as part of an act entitled—

> "An act to amend an act entitled 'An act to prevent corrupt practice in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation of this act', approved March 31, 1893, by inserting between Sections 4 and 5 three new sections to be known as Sections 4a, 4b, and 4c";

and that this said section is unconstitutional and invalid because the intent and purpose of the said Section 11785 R. S. Mo. 1939 does not indicate a purpose to enact provisions that are germane to the subject expressed in the title of the original act above set out and that the title of the original act passed at the 37th General Assembly of the State of Missouri and found in the laws of Missouri for 1893 on Page 157, or the title of the act as amended by the 39th General Assembly and found in session laws for the State of Missouri for 1897, Page 108 does not include in the title the subject of said Section 11785 R. S. Mo. 1939.

[fol. 12] 11. Section 11785, R. S. Mo. 1939, is invalid and unconstitutional in that if this defendant performs the acts necessary to avoid further and future prosecution here-

under, he will then be in violation of Section 11786, Revised Statutes of Mo. 1939, which provides, in part, that no corporation shall induce or persuade any employee to vote on any question to be determined at any election.

(S. Louis J. Portner, 509 Olive St., St. Louis, Mo., and Cobbs, Logan, Roos & Armstrong, by (S.) Henry C. M. Lamkin, 506 Olive Street, St. Louis, Missouri, Attorneys for Defendant.

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[fols. 13-15] Continuances from July 11th to October 13, 1949 (omitted in printing).

[fol. 16] In the St. Louis Court of Criminal Correction

[Title omitted]

Motion to Quash Overruled and Cause Taken Under Advisement—Oct. 13th, 1949

Now, on this day, comes the Prosecuting Attorney for the State, and the defendant, Day-Brite Lighting, Inc., a corporation, appears in Court by and through the person of its officer, and there also appears Louis J. Portner, Esq., and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos; by Henry C. M. Lamkin, Esq., attorneys for the defendant, thereupon defendant's motion to quash Count 2 of the information herein, was duly heard and considered, and was by the Court overruled; and all of the parties herein then announced ready for trial on Count 2 of the information, and to be tried by the Court on an agreed stipulation of facts; thereupon the Court ordered the trial to proceed; whereupon the agreed stipulation of facts in writing signed by all of the parties was filed, and the cause was fully heard and tried by the Court. The defendant, by its attorneys, orally moved both at the close of the State's case and at the close of the entire case for dismissal of the cause and its discharge, and each of said oral motions were duly considered by the Court and denied; and said cause was then taken under submission by the Court and passed to October 20th, 1949, for decision.

[fol. 17] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

STIPULATION OF FACTS

It is hereby stipulated between the State of Missouri, by the Prosecuting Attorney for the City of St. Louis, and the Defendant, Day-Brite Lighting, Inc., by its attorneys, that the facts which would be produced in evidence in the above matter would be as follows:

1. That the Day-Brite Lighting, Inc. was at the time of the filing of the Information, a Missouri corporation operating a manufacturing plant at 5401 Bulwer Avenue, in the City of St. Louis and State of Missouri; and engaged in the production of goods that moved in interstate commerce;

2. That November 5th, 1946 was a day duly designated by law for the holding of a general election in the City of St. Louis and State of Missouri, and that on said election day the polls were open from 6 A.M. to 7 P.M.;

3. That the said Defendant had in its employ one Fred C. Grotemeyer, residing at 1534 Warren Avenue, St. Louis, Missouri, who was a duly registered voter entitled to vote at the election held as aforesaid on the 5th day of November, 1946;

4. That Grotemeyer had been employed by Defendant for some five years and that he was a member of Local No. 1, International Brotherhood of Electrical Workers, which said Local had a contract with the Defendant, covering wages, hours, and other working conditions.

5. That on said November 5, 1946, said Grotemeyer was employed and under the terms of said contract paid on an hourly basis at the rate of $1.60 per hour for each hour [fol. 18] worked, and he worked on a shift from 8:00 A.M. to 4:30 P.M., with a lunch period of 30 minutes from 12:00 to 12:30 Noon.

6. That Grotemeyer requested permission on the 4th day of November from one Wilks, Plant Superintendent for the Defendant, to absent himself for a period of four hours from his scheduled work day the next day to vote, and that the said Wilks refused him such permission.

7. That Grotemeyer, under the contract was required to report for work at 8:00 A.M. That the company furnished a booklet setting forth the rules and regulations to all employees of the company; That this booklet provided that no employee, except in cases of sickness or emergency, should be absent from work without permission of his supervisor and even then he must report to his supervisor the reasons for failing to be at work.

8. That on the day preceding the election day in question Defendant posted a notice on its bulletin board allowing all employees on the day shift (including Grotemeyer) to take time off for voting at 3:00 in the afternoon, which would be 1½ hours earlier than the said Grotemeyer normally got off work; which would permit Grotemeyer to absent himself from his employment four consecutive hours between the opening and closing of the polls on said election day.

9. That Grotemeyer's house was approximately 200 feet from the polling place in which he voted; that he absented himself from his employment at 3 P.M.; that he voted about 5:00 in the afternoon and it took him about five minutes to vote; that Grotemeyer wanted four hours from his employment, namely from the noon hour on, to do campaigning to vote and to get out the vote; that four hours was not necessary for voting; that it only took him about 20 minutes to get from his home to his work;

10. That Grotemeyer was paid by the Defendant for only those hours worked (6½ hours) on the day in question, or for the time from 8 A. M. to 3 P. M. less the normal 30 minute lunch period; and that he was not paid for the hour and a [fol. 19] half from 3:00 to 4:30 P.M. which was normally included in his scheduled work day; and that the plant could not operate if all employees were given four hours from work to vote.

11. A witness named Jacobs who was the International Vice-President of the International Brotherhood of Electrical Workers would testify to the Union contract between the Defendant and Grotemeyer's Local; that on the day prior to the election he discussed with Mr. Wilks, Plant Superintendent for the Defendant, the question of Union members being allowed four hours off from their normal

scheduled work day, with pay for the time not worked, for the purpose of voting during the election.

12. That he, Jacobs, had been active in organized labor for 30 years, was familiar with its history in the State as he had done quite a bit of research work in the matter; that organized labor had brought about many desirable advantages and had improved working conditions for the laboring man, and that one of the advantages was a great shortening and decrease in the normal hours worked per day.

13. That basing his answer on a study of history, the average working day 50 years ago in the State was 14 to 16 hours; that it had been at least 10 hours a day in the Union to which he belonged; that the average working day in his Union was now 8 hours and that no demand had ever been made by the Union for four hours off of the scheduled work day, on election day, with pay from the Defendant prior to the election day in question.

14. That the foregoing evidence would be all of the testimony produced on behalf of the State.

15. Klingsick on behalf of the Defendant, as the Defendant's Vice-President, Treasurer and General Manager, would testify that 158 employees worked at an average hourly rate of $1.089 from 8:00 A. M. to 4:30 P. M.; that 58 employees worked at an average hourly rate of $1.03 from 7:00 A. M. to 3:30 P. M., and 7 employees worked at an [fol. 20] average hourly rate of $.8646 from 7:00 A. M. to 3:00 P. M.; that the total amount of wages that would be paid to all employees for not working, if all took four hours off from scheduled work day to vote, with pay, would be $951.42; and that 4 hours of production loss amounting to $7,138.00 would have resulted on the day in question.

16. That Klingsick wrote the Booklet for Employees' Information testified to by Grotemeyer; that he had dictated the notice placed on the bulletin board relative to the time that members of the day shift could take off for the purpose of voting; that this was done so that the employees would be informed as to the procedure to be followed on election day (if they desired to be absent) and that the hour of 3:00 in the afternoon was arrived at because that time could give employees four consecutive hours in which to vote before the polls closed.

17. That the two Union contracts between the Defendant and the electrical workers governed the relation between the Defendant and most of its employees; that under the contracts wages were paid only for each hour worked, on an hourly rate; that a work week consisted of 40 hours divided into 8 hours a day, five days a week; that employees contracted under the Union contracts to be on the job ready to work at the scheduled starting time and to be at work until schedaled quitting time during the normal work day;

18. That the Defendant would offer in evidence testimony to show the financial loss to the employers of the State if all employees should be given four hours off with pay on election day; that the State would object to the admission of such testimony and upon the objection of the State being sustained the Defendant would make an offer of proof showing that according to the Missouri Employment Security Information Bulletin of June, 1949, published by the Missouri Division of Employment Security, that in April, 1949, in the State of Missouri there was 330,600 hourly-paid employees engaged in manufacturing industries, and 729,600 employees engaged in nonmanufacturing industries and that the average hourly earning of employees engaged in [fol. 21] manufacturing industries during the same month was $1.302, and that figures were not available for the hourly rate for nonmanufacturing industries. The above figures did not include agricultural employment.

19. That this would be all the evidence produced on behalf of the Defendant.

(Signed) William C. Lochomoeller, Prosecuting Attorney for the City of St. Louis, by Jasper R. Vettori, Asst. Prosecuting Attorney on Behalf of the State of Missouri, and Louis J. Portner, and Henry C. M. Lamkin of Cobbs, Logan, Armstrong, Teasdale & Roos, on Behalf of Defendant, Day-Brite Lighting, Inc.

[fol. 22] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

VERDICT—October 20th, 1949

Now, on this day, comes the Prosecuting Attorney for the State, and the defendant, Day-Brite Lighting, Inc., a corporation, appears in Court by and through the person of its officer, and there also appears Louis J. Portner, Esq., and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos, by Henry C. M. Lamkin, Esq., attorneys for the defendant; and said cause again coming on for further proceedings, the Court upon defendant's application granted defendant leave to amend the agreed stipulation of facts heretofore filed in this cause. Defendant having heretofore been discharged as to Count 1 of the information on its appeal to the St. Louis Court of Appeals, the defendant corporation is tried only on Count 2 of the information herein; and the Court having fully considered all the evidence, and the law of this cause, and the Court, being fully advised thereof and concerning the same, doth find and adjudge the defendant guilty as to Count 2 of said information and fixes its punishment at a fine of $100.00 and costs. Defendant granted 20 days in all in which to file its motion for a new trial. Said defendant enters into a motion for a new trial bond with D. J. Biller as security in the amount of $200.00, returnable October 28th, 1949.

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[fols. 23-25] Continuances from October 28th to November 10, 1949 (omitted in printing)

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[fol. 26] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

MOTION FOR NEW TRIAL—Filed November 9, 1949

Comes now Day-Brite Lighting, Inc., a corporation, defendant in the above entitled cause, by Louis J. Portner, and George B. Logan and Henry C. M. Lamkin of Cobbs, Logan,

Armstrong, Teasdale & Roos, its attorneys, and moves the Court to set aside the finding and verdict of the Court and for a new trial in this cause, for the following reasons:

1. The verdict and finding of the Court is contrary to the law because all of the acts of the defendant produced in evidence do not constitute any violation of the law and particularly of Section 11785, R. S. Mo. 39.

2. The verdict and finding of the Court is not supported by any evidence because all of the acts of the defendant produced in evidence do not constitute any violation of the law and particularly of Section 11785, R. S. Mo. 39.

3. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute (Sec. 11785, R. S. Mo. 39) that is unconstitutional because said statute deprives this defendant of its property without due process of law in violation of Section I of the 14th Amendment of the Constitution of the United States.

4. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute (Sec. 11785, R. S. Mo. 39) that is unconstitutional because it deprives this defendant of its property without [fol. 27] due process of law in violation of Section 10 of Article I of the Constitution of Missouri for 1945.

5. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement would constitute the taking of private property for private use in violation of Section 28 of Article I of the Constitution of Missouri for 1945.

6. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement denies to this defendant equal protection of the laws in violation of Section I of the 14th Amendment of the Constitution of the United States.

7. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement denies to this defendant equal protection of the laws in violation of Section 14 of Article I of the Constitution of Missouri for 1945.

8. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement impairs the obligation of contracts in violation of Section 10, Article I of the Constitution of the United States.

9. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that its enforcement impairs the obligation of contracts in violation of Section 13, Article I of the Constitution of Missouri for 1945.

10. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional because the Bill introduced and passed by the Legislature and signed by the Governor [fol. 28] and the amendment to said bill likewise introduced and passed by the legislature and signed by the Governor which originally contained said Section 11785, R. S. Mo. 39, contained more than one subject and the various subjects therein contained were not clearly expressed in the title of either said bill or said amendment in violation of Section 23, Article III of the Constitution of Missouri for 1945.

11. The verdict and finding of the Court is void and invalid in that it is a conviction based on the violation of a statute that is unconstitutional in that if the defendant should attempt to conform with the Court's interpretation of Section 11785, R. S. Mo. 39 in a manner necessary to avoid further and future prosecution for violation thereof it would then be in violation of Section 11786, R. S. Mo. 39 in that its acts necessarily performed in attempting to comply with Section 11785 would induce or persuade an employee to vote in an election contrary to the provisions of Section 11786, R. S. Mo. 39.

12. The verdict and finding of the Court is against the evidence and against the weight of the evidence and there is no substantial evidence to support the verdict and finding.

13. The finding and verdict of the Court is against the law as found in Section 11785, R. S. Mo. 1939.

14. Because the Court erred in overruling the defendant's "Motion to Quash the Information" and "Motion to Quash Count 2" of the information filed in the above entitled cause, and erred in hearing and receiving any evidence on behalf

of the State in the said cause because as a matter of law the grounds set out in defendant's "Motion to Quash" should have been sustained in that the information filed did not charge the defendant with the violation of any law and further that the information was based on a section of the statutes, namely, Sec. 11785, R. S. Mo. 39, that is unconstitutional in that its enforcement would deprive the defendant of its property without due process of law, contrary to Sec. [fol. 29] I of the Fourteenth Amendment to the Constitution of the United States and Sec. 10 of Article I of the Constitution of Missouri for 1945, would constitute the taking of private property for private use, contrary to Sec. 28 of Article I of the Constitution of Missouri for 1945, would deny this defendant equal protection of the law in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States and Sec. 14 of Article I of the Constitution of Missouri for 1945, would impair the obligation of contracts in violation of Sec. 10, Article I of the Constitution of the United States and of Sec. 13, Article I of the Constitution of Missouri for 1945, and because the Bill of which said Section formed a part, contained more than two subjects without the same being clearly expressed in the title, contrary to Sec. 23, Article I of the Constitution of Missouri for 1945, and further that its enforcement would cause this defendant to violate Sec. 11786, R. S. Mo. 39.

15. Because the Court erred in refusing to admit relevant and material testimony in that it sustained the State's objection to introduction of testimony by the Defendant that would establish, in the event the statute in question was enforced, the money value of property that all employers in the State would be deprived of without due process of law contrary to Sec. 1 of the 14th Amendment to the Constitution of the United States and Sec. 10 of Article I of the Constitution of Missouri for 1945, and would establish the value of the private property of all employers in the State of Missouri that would be taken for private use contrary to Section 28 of Article I of the Constitution of Missouri for 1945.

16. The Court erred in overruling defendant's motion for a verdict of acquittal filed by the defendant after the submission of the Stipulation of Facts agreed to by both parties

was filed, the said Stipulation of Facts constituting all of the testimony presented to the Court by either party in said [fol. 30] cause in that the grounds contained in said motion entitled the defendant to a verdict of acquittal in that the information filed did not charge the defendant with any violation of the law and the evidence produced by the State did not show any violation of the law and further that the information was based on a section of the statutes, namely, Sec. 11785, R. S. Mo. 1939, that is unconstitutional in that its enforcement would deprive the defendant of its property without due process of law contrary to Sec. 1 of the Fourteenth Amendment to the Constitution of the United States and Sec. 10 of Article I of the Constitution of Missouri for 1945, would constitute the taking of private property for private use, contrary to Sec. 28 of Article I of the Constitution of Missouri for 1945, would deny this defendant equal protection of the laws in violation of Sec. 1 of the Fourteenth Amendment of the Constitution of the United States and Sec. 14 of Article I of the Constitution of Missouri for 1945, would impair the obligation of contracts in violation of Section 10, Article I of the Constitution of the United States and of Sec. 13, Article I of the Constitution of Missouri for 1945, and because the Bill of which said section formed a part contained more than two subjects without the same being clearly expressed in the title, contrary to Sec. 23, Article I of the Constitution of Missouri for 1945, and further that its enforcement as interpreted by the Court would cause this defendant to violate Sec. 11786, R. S. Mo. 1939.

(S.) Louis J. Portner, 509 Olive St., St. Louis, Mo., and Cobbs, Logan, Armstrong, Teasdale & Roos, by (S.) George B. Logan and (S.) Henry C. M. Lamkin, 506 Olive St., St. Louis, Mo., Attorneys for Defendant, Day-Brite Lighting, Inc., a corporation.

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[fols. 31-32] Continuances from November 10th to December 2, 1949 (omitted in printing).

[fols. 33-34] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

MOTION FOR NEW TRIAL. OVERRULED, JUDGMENT AND ORDER ALLOWING APPEAL—December 2nd, 1949

Now, on this day, comes the Prosecuting Attorney for the State, and the defendant, Day-Brite Lighting, Inc., a corporation, appears in Court by and through the person of its officer, and there also appears Louis J. Portner, Esq. and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos by Henry C. M. Lamkin, Esq., attorneys for the defendant; whereupon the court being fully advised concerning the motion for a new trial, doth order and determine that the said motion be overruled. Thereupon the court doth sentence and orders the defendant to pay a fine of $100.00 and costs. Thereupon the said defendant by its attorneys files its affidavit for an appeal herein, and prays the court to grant it an appeal to the Supreme Court of the State of Missouri, from the judgment rendered against defendant, which said appeal is by the court granted. Thereupon the defendant enters into recognizance in the sum of $200.00 with O. W. Klingsick, Surety, upon the condition that the defendant shall appear in the St. Louis Court of Criminal Correction at such time and place as the Supreme Court of the State of Missouri aforesaid shall direct and shall render himself in execution and obey every order and judgment which shall be made or rendered in the premises, then this recognizance shall be void, otherwise to remain in full force and effect.

$10.00 Filing Fee Paid.

[fol. 35] Bond on Appeal for $200.00 approved and filed December 15, 1947 omitted in printing.

[fol. 36] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

ALLOWANCE OF BILL OF EXCEPTIONS—March 13, 1950

Now, on this day, defendants Bill of Exceptions presented, allowed, signed and filed.

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[fols. 37-38] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 39] IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS

Be it Remembered that heretofore, to-wit, on Thursday, October 13, 1949, Court 2 of the information in the above entitled cause came on for trial before the Honorable Louis Comerford, Judge of the St. Louis Court of Criminal Correction, and the following proceedings were then and there had and made a part of the record in said cause, as follows:

APPEARANCES

William C. Lochmoeller, Esq., Prosecuting Attorney for the St. Louis Court of Criminal Correction, by Jasper R. Vettori, Associate Prosecuting Attorney, appeared for the State.

Louis J. Portner, Esq., and Messrs. Cobbs, Logan, Armstrong, Teasdale & Roos, by Henry C. M. Lamkin, Esq., appeared for the defendant; and defendant appeared in Court by and through the person of Louis J. Portner, its Secretary.

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[fols. 40-44] DEFENDANT'S MOTION TO QUASH COUNT 2 OF THE INFORMATION

Heretofore, to-wit, on the 6th day of July, 1949, the defendant, by its counsel, leave of Court being first had and

obtained so to do, filed in said cause its motion to quash Count 2 of the information, in words and figures as follows, to-wit:

Omitted Printed side page 9 ante.

[fol. 45] MOTION OVERRULED

Whereupon the above and foregoing motion to quash Count 2 of the information filed in said cause by the defendant on said 6th day of July, 1949, was by the Court taken under advisement; that thereafter, on the 13th day of October, 1949, the above and foregoing motion to quash Count 2 of the information, filed in said cause by the defendant, was by the Court overruled.

To which action, finding and ruling of the Court in overruling said motion to quash Count 2 of the information, and in failing and refusing to quash Count 2 of the information herein, the defendant by its counsel then and there duly objected and excepted at the time, and still objects and excepts.

Stipulation of Facts Filed

Thereupon, on said 13th day of October, 1949, the State, by its counsel, in order to maintain the charge made and contained in Count 2 of the information filed herein against the defendant, and the defendant, by its counsel, in order [fols. 46-51] to acquit itself of the charges made and contained in Count 2 of the information filed against it, filed herein, leave of Court being first had and obtained so to do, a stipulation of facts, which said stipulation was in writing and in the words and figures as follows, to-wit:

St. Louis,
Oct. 13th, 1949.

Charged With Violation of Section 11,785 R. S., Missouri (1939), "Employees to Be Allowed Four Hours, Etc."

STATE OF MISSOURI, Plaintiff,

vs.

DAY-BRITE LIGHTING, INC., a Corporation, Defendant

[fol. 52] Omitted. Printed side page 17 ante.

[fol. 53] ORAL DEMURRER AT THE CLOSE OF STATE'S CASE AND AT THE CLOSE OF THE ENTIRE CASE

Mr. Lamkin: I would like to have the record show that at the close of the State's evidence on behalf of the State, the defendant would demur to the evidence; and at the close of all the evidence both on behalf of the State and the defendant, the defendant will renew its demurrer. Any objection to stipulating that, Mr. Vettori?

Mr. Vettori: None whatsoever.

ORAL DEMURRERS OVERRULED

The Court: The oral demurrer to the evidence at the close of the State's case and the oral demurrer to the evidence at the close of the entire case will be overruled.

To which action and ruling of the Court in overruling its said demurrers, the defendant by its counsel at the time then and there duly objected and excepted, and still continues to object and except.

STIPULATION TAKEN UNDER ADVISEMENT

Thereupon the above and foregoing stipulation filed herein was by the Court taken under advisement.

STIPULATION AMENDED

Thereafter, to-wit, on the 20th day of October, 1949, the same parties being present as heretofore, the following proceedings were had, to-wit:

Mr. Vettori: Your Honor please, in this matter counsel [fol. 54] representing the defendant desires to adjust one item to the stipulation filed, which we have no objection to. In paragraph 1 they desire to add this phraseology at the termination of the paragraph as it exists now: "And engaged in the production of goods that moved in interstate commerce." May that be added to the stipulation filed with the Court and considered a part of the evidence in this case?

The Court: It may be so amended.

VERDICT AND JUDGMENT

The Court: Now, after considering the stipulation of agreed facts in this case, the Court finds the defendant corporation, Day-Brite Lighting, Incorporated, guilty as charged in Count 2 of the information, and fixes its punishment at a fine of One Hundred Dollars.

MOTION FOR NEW TRIAL

Thereafter, to-wit, on the same day, the said 20th day of October, 1949, the defendant by its counsel obtained leave of Court to file its motion for a new trial within twenty days.

Thereafter, to-wit, on the 9th day of November, 1949, being within twenty days after the rendition of said verdict and judgment herein, the defendant by its counsel, leave of Court being first had and obtained so to do, filed in said cause its motion for a new trial in words and figures as fol-
[fols. 55-61] lows, to-wit:

Omitted Printed side page 26 ante.

[fol. 62] MOTION OVERRULED

Whereupon the above and foregoing motion for a new trial filed in said cause by the defendant on said 9th day of November, 1949, was by the Court taken under advisement; that thereafter, on the 2nd day of December, 1949, the above and foregoing motion for a new trial, filed in said cause by the defendant, was by the Court overruled.

To which action, finding and ruling of the Court, in overruling the said motion for a new trial, and in failing and refusing to grant it a new trial in said cause, the defendant, by its counsel, then and there duly objected and excepted at the time, and still objects and excepts.

SENTENCE

Thereafter, to-wit, on said same day, the said 2nd day of December, 1949, the defendant appearing in Court by and
[fol. 63] through the person of Louis J. Portner, its Secretary, the Court formally sentenced the defendant as follows:

The Court: The Court will now sentence the defendant company in accordance with the verdict heretofore ren-

dered on October 20, 1949. The Court finds the defendant Day-Brite Lighting, Incorporated, a corporation, guilty, and the Court now sentences said defendant corporation, Day-Brite Lighting, Incorporated, to pay a fine of one hundred dollars and costs; and on its failure to pay such fine, the State may have execution to issue.

AFFIDAVIT FOR APPEAL

And thereafter, on said same day, the said 2nd day of December, 1949, the defendant by its counsel, leave of Court being first had and obtained so to do, filed in said cause its affidavit for an appeal to the Supreme Court of the State of Missouri from the verdict and judgment rendered in said cause against it, which said affidavit for appeal was in writing in the words and figures as follows, to-wit:

"IN THE ST. LOUIS COURT OF CRIMINAL CORRECTION

STATE OF MISSOURI

vs.

DAY-BRITE LIGHTING, INC.

Charged With Violation Sec. 11785 R. S. Mo. 1939

And now comes the defendant by O. W. Klingsick, Vice-President, in the above entitled cause, who being first duly [fol. 64] sworn upon his oath says: That the appeal in the above entitled cause is not made for vexation or delay, but because affiant believes that the appellant is aggrieved by the Judgment or decision of the Court.

(Signed) Day-Brite Lighting, Inc., O. W. Klingsick, Vice-Pres.

Sworn to and subscribed before me, this 2nd Day Dec. 1949. (Signed) Ernest Stoecklin, Clerk. (Seal.)"

* * * * * * * *

Thereupon, to-wit, on the said 2nd day of December, 1949, the above and foregoing affidavit filed in said cause by the defendant was, by the Court, taken up and examined and,

upon finding the same to be in proper statutory form, the Court granted to the defendant an appeal from the verdict and judgment rendered in this Court to the Supreme Court of the State of Missouri.

### Allowance of Bill of Exceptions

And now, inasmuch as the foregoing evidence, proceedings, matters and things, rulings and exceptions, do not appear of record, and in order that the same may be made a part of the record in this cause so as to be presented to said Supreme Court of Missouri, the defendant here now presents to the Court this, its Bill of Exceptions in said cause, and prays that the same may be settled and allowed, [fol. 65] approved, signed, sealed and filed, and ordered made a part of the record in this cause, all of which is accordingly done this 13th day of March, 1950.

Louis Comerford, Judge of the St. Louis Court of Criminal Correction, presiding at the trial of the above cause.

Approved: Louis J. Portner, Cobbs, Logan, Armstrong, Teasdale & Roos, By Henry C. M. Lamkin, Attorneys for Defendant, Appellant; Jasper R. Vettori, Associate Prosecuting Attorney for the St. Louis Court of Criminal Correction, representing the State of Missouri, Respondent.

[fol. 66] IN THE ST. LOUIS COURT OF APPEALS, APRIL SESSION, 1949

No. 27658

STATE OF MISSOURI, Plaintiff-Appellant,

vs.

THE DAY-BRITE LIGHTING, INC., a Corporation, Defendant-Appellant

Appeal from the St. Louis Court of Criminal Correction

Hon. Louis Comerford, Judge

OPINION FILED—May 17, 1949

There being a separate appeal by each party, in order to avoid confusion the plaintiff below will be referred to as the State, and the defendant below as the defendant.

On the 24th day of June, 1947, the associate prosecuting attorney filed an information in the St. Louis Court of Criminal Correction, containing two counts, charging the defendant with having violated the provisions of Section 11785, R. S. Mo., 1939, Mo. R. S. A. Sec. 11785. The first count charged that the defendant, on November 5, 1946, an election day, failed and refused to allow Fred C. Grotemeyer, one of its employees, who was entitled to vote at the election, to absent himself from his employment for a period of four hours between the times of the opening and closing of the polls. The second count charged the defendant with having penalized said employee by deducting from his wages the amount of his earnings for the time he was absent from his work in the exercise of his privilege of being absent [fol. 67] therefrom for a period of four hours to vote at said election.

Thereafter, the court overruled defendant's motion to quash the first count of the information, and sustained defendant's motion to quash the second count. From the judgment quashing the second count the State has appealed. The defendant was tried on the first count, a jury being waived, and was convicted and its punishment fixed at a fine of $100.

From the judgment of conviction on the first count the defendant appeals.

The prosecution, as above stated, is under Section 11783, R. S. Mo., 1939, Mo. R. S. A. 11783, which is as follows:

> "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: Provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The facts are not disputed and are as follows:

The defendant is the employer of about 200 workmen, who were divided into shifts or groups, as to their working hours. Fred Grotemeyer, who had been in the employ of defendant for about five years, worked on a shift which began work at 8:00 o'clock a. m. and worked until 4:30 o'clock p. m. with one-half hour off during the noon hour for lunch. His wages [fol. 68] were $1.60 per hour. The day before the election held on November 5, 1946, the defendant caused to be placed on a bulletin board maintained for the purpose of official notices to its employees a notice as follows:

> "Day-Brite Lighting, Inc. 5411 Bulwer Avenue, St. Louis, Missouri. November 4th, 1946. Employees on day shift only wishing to take time off for voting November 5th may do so by leaving work at three p.m. Day-Brite Lighting, Inc."

On November 4th, Grotemeyer saw Mr. Wilks, who was defendant's plant superintendent, and asked him, "How about getting off at noontime according to the law, with pay, four hours from work?," and Mr. Wilks told him "no." The next morning (election day) Grotemeyer again saw Wilks, and the following question and answer appear in the transcript:

> "Q. What conversation did you have with him, if any, pertaining to this bulletin you saw displayed?
>
> "A. I asked him about the bulletin board. I told him —let me phrase myself right here. According to law we should have four hours off from work with pay. He says no. He says it is on the bulletin board. You can get off at three o'clock but you will not be paid for that hour and a half."

Grotemeyer testified that it would take him about twenty minutes to go from his working place to his home, and that his polling place was within 200 feet of his home. That on November 5, 1946, he voted about 5:00 o'clock in the afternoon, and it took him about five minutes to vote. He said that he wanted time off from the noon hour on in order to do a little campaigning, canvass to get out the vote.

There was evidence that fifty years ago, about the time of the enactment of Section 11785 (Laws 1897, p. 108), the working day was at least ten hours, and the average was [fol. 69] fourteen to sixteen hours, and that today eight hours is the average working day.

The working contracts between the defendant and the labor union to which Grotemeyer belonged show that wages were paid the employees on an hourly rate; that the work consisted of forty hours of five eight-hour days, from Monday to Friday, both inclusive, and that the employees contracted to be on the job ready to work at the starting time and to be at work until quitting time (except on specified holidays and vacation periods, concerning which there is no issue in this case).

Both appeals in the case were taken to the Supreme Court, where the briefs were filed, and the Supreme Court made an order as follows: "Now at this day it appearing to the satisfaction of the Court that there is no constitutional question

in a jurisdictional sense presented in the above-entitled cause, the Court doth order that said cause be and the same is hereby transferred to the St. Louis Court of Appeals."

If the Legislature or the courts in construing legislative acts were required to draw distinctions with hair-like accuracy as to what would constitute taking property without due process of law, there are few laws looking to the health and safety and working conditions of employees which would not come under the constitutional inhibition. It cannot be said that a constitutional question is involved in a jurisdictional sense as to the legislative right to adopt reasonable regulations for the operation of corporations, which are themselves creatures of statutes, and which regu- [fol. 70] lations might place an inconsequential burden on the corporation. In the case of Noble State Bank v. Haskell, 31 S. Ct. 186, 219 U. S. 104, 55 L. Ed. 112, the question involved was whether an assessment against banks for the purpose of creating a Depositors' Guaranty Fund came within the inhibition of the due process clause of the federal Constitution, and the Court said (219 U. S. 110, 111):

> "In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have a few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a nolumus murare as against the law-making power.
>
> "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see Receiver of Danby Bank v. State Treasurer, 39

Vermont, 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. Clark v. Nash, 198 U. S. 361. Strickley v. Highland Boy Mining Co., 200 U. S. 527, 531. Offield v. New York, New Haven & Hartford R. R. Co., 203 U. S. 372. Bacon v. Walker, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. v. Indiana, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

[fol. 71] And so it resolves itself into a question of whether the taking is reasonable and necessary to carry into effect the object and purpose of the legislative enactment with as little burden as possible on either the employee or the employer. In other words, if the taking is for a public good and is so comparatively insignificant with the benefit to the State of the law, so that no two logical minds could differ, the persons affected could not claim, at least in a jurisdictional sense, that the Constitution was involved in a construction of the meaning of the law. Such would be this case, where the least possible burden is case on the employer in order to accomplish the purpose of the law, and so, as said by the Supreme Court in transferring the case to this court, "There is no constitutional question in a jurisdictional sense presented."

In view of the fact that there is no constitutional question in a jurisdictional sense presented in this case, most of the able and exhaustive arguments and briefs are not applicable to the questions we must determine on these appeals, which

is simply the logical meaning of the words of the statute. On the other hand, we must not lose sight of the provisions of the Constitution, lest we, in determining the meaning of Section 11785, attribute to it a meaning which would violate any of the provisions of the organic law. Where a statute is capable of two interpretations, one of which is constitutional and the other unconstitutional, the courts will interpret the language in favor of constitutionality. State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 342, Mo. 365, 115 S. W. 2d 816. And the court of appeals has [fol. 72] the duty to construe the meaning of a statute and to give it a reasonable and logical meaning, if such can be done, and with a view that the statute as construed is a reasonable and constitutional exercise of legislative functions. In re H—— S——, 236 Mo. App. 1296, 165 S. W. 2d 300; Kelly v. Howard, 233 Mo. App. 474, 123 S. W. 2d 584.

That every citizen should be given both the right and the opportunity to vote is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose in the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. It was not intended to apply only to large industrial corporations, but applies with equal force to the employer of the clerk in a crossroads store, the domestic servant in the home, and the laborer on a farm.

To say this section is devoid of uncertainty or ambiguity would be begging the question. One theory advanced is that under this section the employee is entitled to four hours' absence from his regular working hours on the day of election, whereas another theory advanced is that the employee is entitled to four hours' time in which to vote during the thirteen hours comprising an election day. This last stated theory, which we think is correct, means that if the employee's regular working day leaves him at least four consecutive hours on election day during which he would not be engaged in actual service to his employer, the object [fol. 73] and purpose of the statute has been met, and such employee is not entitled to be absent from his regular work-

ing hours at all; or, if such time when the employee is not actually engaged in service to his employer is less than four hours (in this case two and one-half hours), the employer shall permit the absense of the employee from his services for a sufficient time (in this case one and one-half hours) to make up four full hours. Obviously the two opposing views bring about different results. For instance, if the views of the State prevail, as to this employee, he would quit his work at the noon hour, thereby having seven hours' time in which to vote, and the employer would have to pay him $6.40 for four hours of services which were not rendered, whereas if our view of the statute is correct, this employee would quit work at 3:00 O'clock p. m. instead of 4:30 p. m. thus depriving the employer of only one and one-half hours of service instead of four hours, and the employee would have four full hours to vote. Suppose the employee is working on a shift from 4:00 a. m. to 12:00 noon. If the State is correct in its view of the statute the employer would be compelled to grant absence on pay to the employee for four hours before 12:00 noon, regardless of the fact that such employee could be on his job until 12:00 noon and then have seven hours' time in which to vote. On this theory the employee would have eleven hours out of the election day thirteen hours.

If the views of the State are correct there would indeed be a constitutional question involved, not only under the "due process" clause of Section 1, Amendment XIV to the [fol. 74] Constitution of the United States, and Section 10, Article I, Constitution of Missouri, 1945, but also under the "equal protection of the laws" clause of Section 1, Amendment XIV to the Constitution of the United States, and Section 14, Article I, Constitution of Missouri, 1945, because of an unnecessary, arbitrary and unreasonable burden being visited upon the employer, whether it be an individual or corporation, in order to accomplish the simple purpose of the employee having four hours on an election day in which to vote. Then why give the statutory words a strained construction which would invalidate it, if the words are just as susceptible to a meaning that makes it a reasonable and valid law? The Legislature most assuredly had in mind the Constitution, and its various pro-

visions, when it enacted the law, and it is the legislative intent we are seeking in construing the law.

The primary rule of construction of statutes is to ascertain and give effect to the lawmakers' intent. It is of significance that this statute was enacted over fifty years ago, when working hours ranged from ten to sixteen hours a day. It was at that time that the words were used that the employee "be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours *between the times of opening and closing the polls.*" (Italics ours.) The italicized words would be useless and have no place in the sentence where used if the four-hour period is to be restricted to the employee's regular working hours, as the State would contend. But even in that day there were many employees whose service ended at noon, or by 3:00 o'clock in the [fol. 75] afternoon, and we can see no reason why the lawmakers intended to require the employer to give such employee more time to vote, if his regular working schedule gave him a full four hours of free time. Then there was added the proviso, "that his employer may specify the hours during which such employee may absent himself as aforesaid." "As aforesaid" could only mean four hours between the times of opening and closing the polls. The law-makers intended to secure to every citizen both the right and the opportunity to vote. If the voters' regular working hours already gave him the four-hour opportunity to vote, there was no useful purpose in the section at all as to such employee. If the voter already had two and one-half hours' free time, as did Grotemeyer, then if the employer gave him an additional one and one-half hours, the purpose of the law would be met by Grotemeyer's having four full hours in which to vote, and with no more inconvenience and expense to the employer than were necessary and reasonable to effect the purpose of the law. Thus viewing Section 11785 the defendant was improperly convicted under the first count of the information.

The second count of the information presents a different question. It charged that the defendant penalized Grotemeyer by deducting from his salary the amount of his earnings for the time he was absent from his regular

working hours in the exercise of his voting privilege, which in this case would be one and one-half hours. If the defendant did that it was clearly a violation of Section 11785, which declares any employer guilty of a misdemeanor who "shall cause any employee to suffer any penalty or *deduction of wages* because of the exercise of such privilege." [fol. 76] (Italics ours.)

This part of the section is not ambiguous and needs no elucidation. It provides in plain and simple words that there shall be no deduction of wages because the employee exercises the privilege of having a full four hours during the election day thirteen hours in which to vote. If it required one and one-half hours from his regular working day to make up the four hours, and the defendant deducted from his wages for the one and one-half hours, the defendant would clearly be guilty of a violation of the section under the second count of the information.

It follows that the judgment of conviction of the defendant, under the first count of the information, should be reversed, and that the judgment quashing and dismissing the second count of the information should be reversed and the cause remanded for trial on such second count. It is so ordered.

Wm. C. Hughes, Judge.

Lyon Anderson, Presiding Judge, concurs, Edward J. McCullan, Judge, concurs.

[fol. 77] IN THE ST. LOUIS COURT OF APPEALS

Tuesday, May 17, 1949

No. 27658

STATE OF MISSOURI, Plaintiff-Appellant,

vs.

St. Louis Court of Criminal Correction No. 278 June 1947

THE DAY-BRITE LIGHTING, INC., a Corporation, Defendant-Appellant.

JUDGMENT—Filed March 24, 1950.

Now again come the parties aforesaid, by their respective attorneys, and the Court, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment of conviction of the defendant, rendered herein by the St. Louis Court of Criminal Correction under the first count of the information, be reversed and for naught held and esteemed; and that the judgment quashing and dismissing the second count of the information be reversed and the cause remanded to said Court for trial on such second count. Opinion filed.

[File endorsement omitted.]

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Clerk's Certificate to foregoing paper omitted in printing.

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[fol. 78] Argument and submission (omitted in printing).

IN SUPREME COURT OF MISSOURI

No. 41979

STATE OF MISSOURI, Respondent,

vs.

DAY-BRITE LIGHTING, INCORPORATED, a corporation, Appellant

JUDGMENT—November 13, 1950

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said St. Louis Court of Criminal Correction rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (The opinion by Division 1 of the Supreme Court of Missouri was adopted by the Supreme Court en banc as its opinion on June 12, 1951, a copy of which opinion is hereinafter certified.)

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[fol. 79] IN SUPREME COURT OF MISSOURI

[Title omitted]

MOTION FOR REHEARING OR TO TRANSFER TO COURT EN BANC—November 28, 1950

Comes now the appellant, by attorney, and files a motion for a rehearing in the above-entitled cause or to transfer said cause to the Court en Banc, with service shown.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER GRANTING MOTION—December 11, 1950

Now at this day, the Court having seen and fully considered the motion of the appellant for a rehearing in the above-entitled cause, doth order that said motion be, and the same is hereby overruled.

And now at this day, the Court having seen and fully considered the motion of the appellant to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby sustained upon the ground that a Federal question is involved.

[fol. 80] Argument and submission (omitted in printing).

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IN SUPREME COURT OF MISSOURI

No. 41979

STATE OF MISSOURI, Respondent,

vs.

DAY-BRITE LIGHTING, INC., a Corporation, Appellant

JUDGMENT—June 11, 1951

Now at this day, come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the St. Louis Court of Criminal Correction rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinions filed.)

[fol. 81] IN THE SUPREME COURT OF MISSOURI, EN BANC, APRIL SESSION, 1951

No. 41979

STATE OF MISSOURI, Respondent,

vs.

DAY-BRITE LIGHTING, INC., a Corporation, Appellant

Appeal from the St. Louis Court of Criminal Correction

Honorable Louis Comerford, Judge

OPINION—Filed June 11, 1951

This is an appeal from a conviction in the St. Louis Court of Criminal Correction by which defendant-appellant (hereinafter designated as defendant) was adjudged to pay a fine of one hundred dollars for violation of Section 11785, Mo. R.S.A. The case was tried on an agreed statement of facts. The two questions for determination are whether (a) the facts support the verdict and (b) whether that part of the section under which defendant was convicted is violative of the constitutional rights of defendant as guaranteed it under the Constitutions of the United States and the State of Missouri.

Section 11785, enacted in 1897 (Laws 1897 [Section 1] p. 108), reads: "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: Provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby [fol. 82] conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indi-

rectly violate the provisions of this section, shall be deemed guilty of a misdemeanor, * * * ".

The information, as originally filed, charged defendant in count one with refusing to permit its employee (Fred C. Grotemeyer) to absent himself from his employment for a period of four hours between the time of opening and closing of the polls on the general election day of November 5, 1946; in count two with penalizing him by deducting from his salary the amount of his earnings for the time he was absent from his work on that day. Defendant's conviction under count two is the basis of this appeal. For a history of the case prior to this appeal, see State v. Day-Brite Lighting, Inc., 220 S. W. 2d 782.

Defendant, a Missouri corporation, operated a manufacturing plant in the City of St. Louis and its products "moved in interstate commerce". Fred C. Grotemeyer was and for several years prior to November 5, 1946, had been in its employ. He was a member of Local No. 1, International Brotherhood of Electrical Workers, which had a contract with defendant covering wages, hours and other working conditions of its employees. A work week consisted of forty hours, divided into five eight hour days. Grotemeyer was paid on an hourly basis at the rate of $1.60 per hour for each hour worked. His work day began at 8:00 a.m. and closed at 4:30 p.m., with a lunch period of thirty minutes from 12:00 to 12:30 noon. He was to receive pay only for hours actually worked. The rules of defendant provided that no employee, except in cases of sickness or emergency, should be absent from work without permission.

On the day prior to the general election of November 5, 1946, Grotemeyer, who was qualified to vote in that election, asked permission to absent himself for a period of four [fol. 83] hours between the beginning and end of his scheduled work day "to do campaigning, to vote and to get out the vote". This specific request was refused, but defendant on that day posted on its bulletin board a notice permitting all employees on the day shift (including Grotemeyer) to take time off to vote at 3:00 p.m., on November 5th. This was one and one-half hours earlier than Grotemeyer's work day normally would end, but it did permit him to absent himself from his employment for four consecutive hours

between the opening and closing of the polls, which were 6:00 a.m. and 7:00 p.m. On November 5th, Grotemeyer absented himself from his employment at 3:00 p.m. and thereafter voted. He was paid by defendant only for those hours worked on November 5th, to-wit: six and one-half hours, or the time from 8:00 a.m. to 3:00 p.m., less the thirty minute lunch period.

One hundred fifty-eight of defendant's employees worked at an average hourly rate of $1.089 from 8:00 a.m. to 4:30 p.m.; fifty-eight employees worked at an average hourly rate of $1.03 from 7:00 a.m. to 3:30 p.m., and seven employees worked at an average hourly rate of $.8646 from 7:00 a.m. to 3:00 p.m. The total amount of wages paid all employees for not working, if all took four hours off from the scheduled work day to vote, would be $951.42, and four hours of production loss amounting to $7138.00 would have resulted. In April, 1949, there were 230,600 hourly-paid employees in the State of Missouri engaged in manufacturing industries and 729,600 employees in non-manufacturing industries, and the average hourly earnings of these employees in manufacturing industries was $1.302.

Defendant's first contention is that under the agreed statement of facts no violation of Section 11785 was shown. Its argument runs in this wise: "It is not charged defendant threatened to discharge or did discharge Grotemeyer or subject him to any penalty or deduction of wages earned because of the exercise of the privilege of voting. Grotemeyer was paid the amount due him for the work he did for Day-Brite Lighting, Inc. He was not penalized for voting or for taking time off for voting."

[fol. 84] This contention is not sound. It is the clear intendment of the act that the employee shall be paid during his authorized absence as though he had worked. Otherwise, of course, there could be neither penalty nor deduction. It would be an impossibility for the two necessary elements of the offense, to-wit: absence from work and deduction of wages during such absence, ever to come into coexistence under defendant's contention. Regardless of the validity of the act on constitutional grounds, its meaning is clear and the deduction of one and one-half hours from Grotemeyer's wages was a violation of its terms.

The grounds on which defendant challenges the constitutionality of Section 11785 are: (1) violation of the due process clauses of the Constitution of the United States, as defined in Section 1 of the Fourteenth Amendment, and the Constitution of the State of Missouri, as defined in Section 10 of Article I; (2) denial of the equal protection of the laws to all persons within its jurisdiction, as defined in Section 1 of the Fourteenth Amendment of the Constitution of the United States and of Section 14 of Article I of the Constitution of Missouri; (3) impairment of the obligation of contracts as guaranteed by Section 10 of Article I of the Constitution of the United States and Section 13 of Article I of the Constitution of Missouri; and (4) violation of Section 28 of Article IV of the Constitution of Missouri of 1875, and of Section 23 of Article III of the Constitution of Missouri of 1945, which provide that no bill shall contain more than one subject, which shall be clearly expressed in its title. (There is another general claim of unconstitutionality which we consider inadequate and which is disposed of later herein.)

The state contends defendant has not properly raised the question of constitutionality. Each of these grounds, with the exception mentioned, was set forth with particularity in a timely motion to quash, the motion for new trial, and in defendant's brief. That is sufficient. Section 4125, Mo. [fol. 85] R. S. A.; State v. Hammer, 333 Mo. 40, 61 S. W. 2d 965, 966. Especially is this true where it is evident from the entire record that the only issue before either the trial court or this court, except that the facts did not support the verdict, was the constitutionality of that part of the section under which defendant was charged. City of St. Louis v. Friedman, 358 Mo. 681, 685, 216 S. W. 2d 475, 477.

It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions unless its enactment is within the police power of the State.

The State has placed in its brief a tabulation of statutes dealing with the right of employees to absent themselves on election days. Sixteen states make it unlawful for the employer to dock the employee's wages during such absence, to-wit: Arizona, California, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, New York,

Ohio, South Dakota, Texas, West Virginia and Wyoming. Colorado and Utah statutes provide that there shall be no dockage except when the employee is paid by the hour. Six states authorize absence of the employee on election days, with no provision for payment of wages. Illinois and Kentucky statutes relating to the same subject matter have been held unconstitutional. A New York statute has been held constitutional.

Defendant strongly relies upon the case of People v. Chicago, Milwaukee & St. Paul Railway Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. It held unconstitutional a statute similar to Section 11785 on grounds that it deprived the employer of its property without due process of law, denied equal protection of the laws and was an unreasonable abridgment of the right to contract. That opinion was written in 1923. It is interesting to note that in 1944, the same court, referring to its 1923 opinion, commented: "It is urged that the State may not take private property nor money for a private use * * *, and the case of People v. Chicago, M. and St. P. R. Co., 306 Ill. 486, 138 N. E. 155, 158, 28 A. L. R. 610, is cited in support of such contention. [fol. 86] * * * However, this [pay-while-voting] statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. * * * The growing complexity of our economic interests has inevitably led to an increased use of regulatory measures, in order to protect the individual so that the public good is reassured by safeguarding the economic structure upon which the good of all depends." Zelney v. Murphy, 387 Ill. 492, 56 N. E. 2d 754, 757.

Defendant also cites the case of Illinois Cent. R. Co. v. Commonwealth, 305 Ky. 632, 204 S. W. 2d 973, in which the Court of Appeals of Kentucky held a pay-while-voting statute of that state unconstitutional. The decision in this case was based on the 1923 Illinois decision. It extols at great length the sanctity of the voting privilege and holds constitutional that part of the statute giving the employee the right to absent himself for a period of four hours on election day, but condemns as violative of due process the

part making it a misdemeanor to withhold his wages for so doing.

The opinion states: "The Commonwealth makes the contention that our legislative authority had a right, under the exercise of its police power, to adopt the law in question, since its adoption was in the interest of the general welfare of the public. * * * However, we have said that the legislative authority may not, under the guise of promoting public interest, arbitrarily interfere with private business. City of Louisville v. Kuhn, 284 Ky. 684, 145 S. W. 2d 851. And it is always appropriate to remember that the police power is not without its limitations, since clearly it may not unreasonably invade and violate those private rights which are guaranteed under either federal or state constitution. 11 Am. Jur. 992." Thus, the opinion goes from premise to conclusion, with no statement of the reasoning by which it was reached. It is not helpful.

As against the Illinois and Kentucky cases, the state cites the case of People v. Ford Motor Co., decided by Ap- [fol. 87] pellate Division of the Supreme Court of New York in 1946, 271 App. Div. 141, 63 N. Y. S. 2d 697. That case held constitutional a New York statute which makes it a misdemeanor to refuse an employee the privilege of voting or to deduct from his wages for exercising the privilege. We quote portions of it: "The statutes in question, in force for more than half a century, deal directly with a detail as to the exercise of the elective franchise—a subject matter which, under our form of government, is in itself a primary act of sovereignty. To take measures to insure the full and free performance of that act is therefore in the interest of the general welfare, and as such may be said to call forth 'society's natural right of self defense' which is inherent in sovereignty itself and which has been generally termed the police power. * * *

"An employer-employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote at an election. The fact that such abuses have occurred is historical. To avoid such evils, to encourage the right of suffrage, to keep it pristine and render it efficient—all this pertains to the public welfare and, in the

attainment of those objectives, the burden which the statutes cast upon all in the role of an employer is one lawfully placed in a design for the common good, and the burden is so slight that it may not be said to be unduly oppressive. That the burden may bear unequally does not render its placement unlawful."

A precise definition of police power is not found. "It is not susceptible of circumstantial precision because none can foresee the ever-changing conditions which call for its exercise. Moreover, it has been held that these conditions render it inadvisable to define the power accurately." 11 Am. Jur., Constitutional Law, § 246, pp. 970, 971.

"Judge Cooley says that the police power of a state 'embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to [fol. 88] prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others,' and the courts have quoted this definition with approval many times. Finally, it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance, by each individual member of society, of the duties which he owes to others and to the community at large." Id. § 247, 972, 973.

Discussing police power, this court said in Household Finance Corporation v. Shaffner, 356 Mo. 808, 818, 203 S. W. 2d 734, 739; "Section 3, Article I, states that the police power of the state remains exclusively in the people; and Section 3, Article XI, provides that 'the exercise of the police power of the state shall never be surrendered'. It is a familiar principle that "the state constitution is not a grant of power, but only a limitation, as far as the legislature is concerned'; and, therefore, except for the limitations imposed thereby 'the power of a state legislature is unlimited and practically absolute'. 11 Am. Jur. 894, Sec. 193."

The police power of the state is frequently invoked in

legislation relating to the economic and physical welfare and safety of employees and the public in general, all of which are an expense to the employer or the manufacturer; and such legislation is uniformly held constitutional in principle. Some of them are: workmen's compensation laws, unemployment compensation laws, semi-monthly payment of wage laws, minimum wage and hour laws, Sunday labor laws, and the great multiplicity of safety and health laws. See cases referred to in State v. Day-Brite Lighting, Inc., supra, l. c. 784; Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 81 L. Ed. 1245; Steward Mach. Co. v. Davis, 301 U. S. 548, 57 S. Ct. 883, 81 L. Ed. 1279, 109 A. L. R. 1293; Noble State Bank v. Haskell, 219 U. S. 104, [fol. 89] 31 S. Ct. 186, 55 L. Ed. 112.

If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also. The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that "Eternal vigilance is the price of liberty". For the vast majority the only opportunity to exercise that vigilance is in the polling place.

"That every citizen should be given both the right and the opportunity to vote is a matter of public interest, and any law having for its purpose the guarantee of such right and opportunity should be upheld if it is possible to do so. Such we take it was the legislative purpose of the enactment of Section 11785. And the purpose or legislative intent was not to financially enrich the voter or to place an unnecessary and unreasonable burden on the employer. * * *" State v. Day-Brite Lighting, Inc., supra, l.c. 785.

Appellant agrues that: "The Company is deprived of property of two kinds under this Statute. It is deprived of tangible property, that is, money that it is forced to pay to its employees for work not performed and for which the Company receives nothing. * * * If all employees were granted four hours off with pay from the scheduled work day it would cost the Company in this case $951.42 by way of pay to its employees and an additional sum of $7138.00 for loss of production."

It does not necessarily follow, however, that the act is thereby rendered unconstitutional. The figures quoted

above have little probative value. They do not show, nor is there any evidence tending to show—either percentage-wise or otherwise—, their relationship to the overall cost of defendant's products.

In a well documented article on the subject of "Pay While Voting" in the Columbia Law Review of 1947, page 140, the writer makes this statement: "Whatever may be the wisdom of pay while voting statutes, they do not appear so arbitrary or unreasonable as to violate due process require-
[fol. 90] ments. The burden imposed on the employer is relatively slight and the interest subserved, the right to vote, relatively high."

When we consider the infrequency with which elections are held in comparison with the total working days in a calendar year, we cannot say as a matter of law that the economic burden placed on employers by this statute is unreasonable.

To secure the free and open elections guaranteed by our State Constitutions (Constitution of 1875, Sec. 9, Art. II; Constitution of 1945, Sec. 25, Art. I), the General Assembly enacted legislation (Laws 1893, p. 157) to prevent corrupt practices in elections. Section 11785 was not in that act, but in 1897 (Laws 1897, p. 108) it was amended to include the present Sections 11785 to 11787. The Legislature, in effect, thereby declared that in order to more adequately secure free and open elections it was expedient to require employers to afford their employees not only an opportunity to vote but also that they might exercise that right without penalty or deprivation of wages.

In determining whether a statute is constitutional it is not the province of courts to determine its wisdom or adequacy. "The basic principles that courts only look to the constitutionality of legislation, and not to its propriety, justice, wisdom, necessity, expediency, or policy have constantly been applied in cases involving police regulations. If an act had a real and substantial relation to the police power, then no matter how unreasonable or how unwise the measure itself may be, it is not for the judicial tribunals to avoid or vacate it upon constitutional grounds." 11 Am. Jur. § 306, p. 1089.

"If there is any reasonable basis upon which the legisla-

tion may constitutionally rest the court must assume that the legislature had such fact in mind and passed the act pursuant thereto. All facts necessary to sustain the act must be taken as conclusively found by the legislature, if any such facts may be reasonably conceived in the mind of [fol. 91] the court. * * * 'Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them, or be convinced of the wisdom or adequacy of the laws.'" Poole & Creber Market Co. v. Breshears, 343 Mo. 1133, 1147, 125 S.W. 2d 23, 31.

We conclude that the provisions of Section 11785 are within the police power of the state and do not violate the due process clauses of either the Federal or State Constitutions.

Defendant invokes the last clause of Section 1 of the Fourteenth Amendment of the United States Constitution which forbids any state to deprive any person the equal protection of the laws (and refers to Section 14, Article I, Constitution of Missouri as a corollary). The cases cited in its brief support the principle announced in the amendment, but they are not decisive of the question involved here. They are: Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254; Frost v. The Corporation Commission of the State of Oklahoma, 278 U. S. 515, 73 L. Ed. 483; State v. Miksicek, 225 Mo. 561, 125 S.W. 507; State v. Empire Bottling Co., 261 Mo. 300, 168 S.W. 1176; Ex Parte French, 315 Mo. 75, 285 S.W. 513; State v. Taylor, 351 Mo. 725, 173 S.W. 2d 902.

Defendant's argument is: "It is submitted that the statute in question violates this constitutional guarantee in that it singles out as a class those who employ labor as against those who do not. It even goes further to single out one part of the labor-employing class; namely, those who employ labor on an hourly paid basis as opposed to those who employ labor paid by the week or the month."

The courts have often decided that the classification of the relations of employers are proper and necessary for the welfare of the community. Truax v. Corrigan, supra. When all persons within the purview of a statute are subjected to like conditions, then they are afforded equal protection of the law. Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780; Hull v. Baumann, 345 Mo. 159, 131 S.W. 2d 721; St. Louis

Union Trust Co. v. State of Missouri, 348 Mo. 725, 155 S.W. 2d 107. "* * * as long as the law operates alike on all [fol. 92] members of a class * * * it is not subject to any objections that it is special or class legislation." 11 Am. Jur., Constitutional Law, § 478, p. 144.

Section 11785 is singularly free from the criticism levelled against it by this assignment. It applies with complete uniformity of duty and privilege, respectively to all employers and to all employees, without regard to the method of computing their compensation. This contention is ruled against defendant.

Defendant contends that Section 11785 violates Section 10, Article I, of the Constitution of the United States and Section 13, Article I, of the Constitution of Missouri. These sections forbid legislation impairing the obligations of contracts.

Freedom of contract is always qualified by valid police regulations. "This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day * * *; in limiting hours of work of employees in manufacturing establishments * * *; and in maintaining workmen's compensation laws * * *. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. * * *" West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 A.L.R. 1330.

In the case of Gideon-Anderson Lumber Co. v. Hayes, 348 Mo. 1085, 156 S.W. 2d 898, 899, this court quoted with approval from Atlantic Coast Line Rd. Co. v. Riverside Mills, 219 U. S. 186, 202, 31 S. Ct. 164, 169, 55 L. Ed. 167, as follows: "It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot [fol. 93] be lawfully made at all; and the power to make

contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Having determined that the subject matter of Section 11785 is within the police power of the state, that it is not shown as a matter of law to be unreasonably burdensome, and that it is calculated to protect the general welfare of the people, we hold it does not unconstitutionally impair the obligations of the contract between defendant and its employees.

Is the act, of which Section 11785 is a part, in contravention of Section 23, Article II, Constitution of 1945? This provision was also in the Constitution of 1875 as Section 28, Article IV. It provides that "no bill * * * shall contain more than one subject, which shall be clearly expressed in its title". Section 11785 is an amendment to the "corrupt practice act" of 1893 (Laws 1893, p. 157). The title of the original act is: "An Act to prevent corrupt practices in elections, to limit the expenses of candidates, to prescribe the duties of candidates and political committees, and provide penalties and remedies for violation on [of] this act". No fault is found with the title of the original act.

The complaint is that the sections added by an amendatory act of 1897 (Laws 1897, p. 157), one of which is now Section 11785, were not germane to the subject matter of the original act; and that, inasmuch as the amendatory act of 1897 adopted by reference and without change the title of the original act, the new subject matter thus added is not clearly expressed in its title.

"If the title of an original act is sufficient to embrace the provision contained in an amendatory act, it will be good, and it need not be inquired whether the title to the amendatory act would, of itself, be sufficient." State ex rel. Drain-[fol. 93a] age District v. Hackmann, 305 Mo. 685, 701, 267 S.W. 608. See also Young v. County of Greene, 342 Mo. 1105, 119 S.W. 2d 369, and cases therein cited.

We, therefore, look to the title of the original act to determine whether the subject matter of the amendatory act is "germane to and within the scope of the general purpose

of the bill (original act) as declared in its title and which, although not set forth in the particulars expressed in the title, are not out of harmony with them". Graves v. Purcell, 337 Mo. 574, 85 S.W. 2d 543, 548. See also Edwards v. Business Men's Assur. Co., 350 Mo. 666, 168 S.W. 2d 82, 83.

Section 11785, by its terms, makes it a crime for an employer to deny its employees the privilege of absenting themselves from their work on election days and a crime to dock their wages if they do. In essence, therefore, the employer who practices the acts condemned by the statute, as did defendant, is guilty of "corrupt practices in elections", which is the first definitive phrase of the original act. We will not further labor the matter. The title of the amendatory act, by its reference to the original, is sufficient.

Finally, it is urged that Section 11785 is in conflict with 11786 and is, therefore, unconstitutional "in that, if defendant should conform with the provisions of Section 11785, it would then necessarily be in violation of Section 11786, R. S. Mo. 1939". We are pointed to no constitutional provision to support the contention, and we find none. The assignment is insufficient to raise the question. State ex rel. Karbe v. Bader, 336 Mo. 259, 78 S.W. 2d 835.

The contention, however, obviously is without merit. Section 11786 provides: "It shall not be lawful for any corporation * * * to induce or persuade any employee * * * to vote or refrain from voting for any candidate, or on any question to be determined or at issue at any election. * * *" Section 11785 is directed at the em- [fol. 94] ployer who refuses to give the employee time to vote or penalizes him if he takes the time. Section 11786 is directed at the employer inducing or persuading the employee *how* to vote. They are not in conflict.

The judgment of the trial court is affirmed.

Frank Hollingsworth, Judge.

Dalton, Leedy and Tipton, J.J. concur; Hyde, J. dissents in sep. op.; Vandeventer, Special Judge, dissents in sep. op. filed and concurs in sep. op. of Hyde, J.; Conkling, J. dissents and concurs in dissenting opinions of Hyde, J. and Vandeventer, Special Judge.

[fol. 95] [Title omitted]

DISSENTING OPINION, HYDE, J.

I respectfully dissent from the ruling that a crime was committed in this case. Strict construction of criminal statutes is a fundamental principle of our law. "Criminal statutes are to be construed strictly: liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication." (State v. Bartley, 394 Mo. 58, 263 S. W. 95; See also State v. Lloyd, 320 Mo. 236, 7 S. W. (2d) 344; State v. Taylor, 345 Mo. 325, 133 S. W. (2d) 336; State v. Dougherty, 358 Mo. 734, 216 S. W. (2d) 467; Tiffany v. National Bank of Missouri, 85 U. S. 409, 18 Wall. 409, 21 L. Ed. 862.) A defendant should not be held to have committed a crime by any act which is not plainly made an offense by the statute.

The statute in this case, Sec. 129.060, R. S. 1949, is as follows: "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to [fol. 96] any penalty: Provided, However, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The first sentence states the privilege conferred upon an employee. The second sentence makes it a crime for an employer to refuse to any employee the privilege conferred by the first sentence. Nowhere in the first sentence is it stated that the privilege includes payment by the employer

to the employee for time or activity not covered by the terms of his employment. It only says that he shall not be liable to any penalty. When, as here, the contract (under which the employee agrees to work and under which the employer obligates himself to pay) provides that the employee is to receive $1.60 per hour for each hour worked, there could be no penalty by not paying him what he has not earned. It is true that the second sentence of the statute makes imposing a "penalty or deduction of wages" an offense, and thereby includes "deduction of wages" in the definition of the term "penalty"; but how can there be a "deduction of wages" unless some wages have been earned? It is conceded here that the employee was paid for the full time he had worked on election day and every other day. How can an employee, who is paid on the basis of so much per hour for every hour worked, and who receives pay at the agreed rate for every hour of work actually performed, be subjected to "deduction of wages" by not being paid more? There must first be a right to wages before there can be a deduction of wages, and there is nothing in this statute which creates a right to any wages or [fol. 97] pay beyond that for which the parties have contracted. Therefore, no duty is imposed on an employer to pay more than is provided for by the contract of employment made by the parties themselves. I think to construe it otherwise would be to make such employers and employment contracts subject to this statute purely by implication, and to me a very far fetched implication at that.

Furthermore, I think to construe this statute as creating a right to wages beyond and in addition to what the parties have agreed upon, would make it unconstitutional as including an additional subject not clearly expressed in the title, in violation of Sec. 23, Art. III of our Constitution. This is a very broad statute; it covers every election of any kind and every kind of employment, agricultural and domestic, as well as industrial. Surely to create such a broad and all inclusive right and obligation as to require any person, who employs another to work and be paid by the hour, to also pay him on any election day for the time he takes to vote (up to four hours) is a new subject to our law and our economy. The purpose of this section of the Constitution

is to prevent the public and the members of the Legislature from being misled as to the contents of a bill. (State ex rel. United Railways Co. v. Wiethaupt, 231 Mo. 449, 133 S. W. 329; State ex inf. Barrett v. Inmoff, 291 Mo. 603, 238 S. W. 122; see also Hunt v. Armour & Co., 345 Mo. 677, 136 S. W. (2d) 312.) The title to this act was: "An Act to Amend an Act Entitled 'An Act to Prevent Corrupt Practices in Elections, to Limit the Expense of Candidates, to Prescribe the Duties of Candidates and Political Committees, and Provide Penalties and Remedies for Violation of This Act,' approved March 31, 1893, by inserting between Sections 4 and 5 three new sections to be known as Sections 4a, 4b and 4c." (Laws 1897, p. 108.) It seems to me clear that neither this title, nor the title to the original "Corrupt Practices Act" included in it, gave any indication whatever that a new right was being created to obligate every employer to pay wages to anyone employed by him, [fol. 98] for time taken to vote, in addition to the wages and method of work and payment agreed on between them.

It is, of course, highly desirable to include in the corrupt practices act a prohibition against any influence or intimidation of an employee by an employer and certainly also against imposing any penalty or making any deduction of wages actually earned and due under the contract between them. It is equally important to safeguard the employee's right of franchise by requiring his employer to allow him time to vote; and to make a violation of such obligations by the employer a criminal offense. An employee, whose contract is to be paid by the month or year, has, of course, earned his pay even though he has taken off from his duties some time to vote or for other personal purposes. It would certainly be a violation of the employment contract, as well as a corrupt practice, for an employer to hold out part of compensation earned, under such circumstances. However, the matter of time of service and method of compensation is a matter of contract, at least until the State steps in to regulate it, and certainly when the State does decide to do so (by fixing maximum hours, minimum hours or requiring pay for an outside activity) that is a separate and distinct subject from election laws or corrupt election practices.

I think the judgment should be reversed.

Laurance M. Hyde, Judge.

Conkling, J. and Vandeventer, Spec. J., Concur.

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[fol. 99] Dissenting Opinion—Vandeventer, J.

In addition to the reasons given by Judge Hyde in his dissenting opinion, in which I concur, I think this cause should be reversed because that part of Sec. 11,785 upon which this conviction is based conflicts with the State and Federal Constitutions. I believe that section (now Sec. 129.060 R. S. Mo. 1949) is unconstitutional in so far as it makes it a crime for an employer to *deduct* from the pay of his employee the amount of time lost by the employee in absenting himself on election day. In my judgment, it violates the provisions of both the state and federal constitutions which forbid the taking of property without due process of law, and guarantees to every citizen the equal protection of the law. (Am. XIV Const. U. S. Sec. 1., Art. I, Sec. 10, Const. Mo. 1945) The statute in question is as follows:

"*Any person entitled to vote at any election* in this state *shall*, on the day of such election, *be entitled to absent himself from any services or employment in which he is then engaged or employed*, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting [fol. 100] himself, be liable to any penalty: Provided, However, that his employer may specify the hours during which such employee may absent himself as aforesaid. *Any person or corporation who* shall refuse to any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or *shall cause any employee to suffer any* penalty or *deduction of wages because of the exercise of such privilege*, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof

be fined in any sum not exceeding five hundred dollars." (Italics mine.)

A careful reading of this statute demonstrates that its main purpose was to allow every employed citizen to absent himself from his labor on election days long enough to cast his ballot. There is nothing in this statute that requires him to vote, although he may demand four hours relief between the opening and closing of the polls. The part that I think is unconstitutional is that part which condemns the employer if he *deducts* any of the employee's wages. Really, it isn't a deduction of wages for the employee has rendered no services for which he should be paid. The statute apparently means that if the employer fails to pay the employee for work that he does not do during the usual working hours when the employee is absent, the employer is deemed guilty of a misdemeanor. He is guilty, according to the statute, if he "shall cause any employee to suffer any * * * deduction of wages because of the exercise of such privilege, * * *." The privilege given by the words of the statute is not the privilege of voting but it is the privilege of absenting himself for four hours between the opening and closing of the polls. Whether reference to the privilege or duty of voting was left out deliberately and designedly, we have no way of knowing, but clearly under [fol. 101] the statute, the employer could be punished for deducting any wages of the employee during the time he has absented himself, whether he voted or not. However, if the statute did specifically say that the employee must vote, if he takes the time off, I am still of the opinion that it attempts to take property of the employer without due process of law, and denies him the equal protection of the law.

Due process of law, when referring to legislation, has been defined as follows:

> "As applied to legislation, due process of law means statutes that are general in operation and affect the rights of all alike." (16 C. J. S. Constitutional Law, Sec. 567 (c), Page 1145.)

It does not mean merely an act of the legislature, for such a construction would abrogate all restrictions on legislative power. Pauly vs. Keebler, 185 N. W. 554, 175 Wis. 428.

There are decisions that hold squarely under a statute almost identical with this one that it is violative of these constitutional guarantees. Those cases are: People vs. Chicago M. & St. P. R. Co. 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610. McAlpine vs. Dimick, 157 N. E. 235, 326 Ill. 245. International Shoe Co. vs. Caldwell, 204 S. W. (2) 973, 305 Ky. 632, Cer. den. 92 L. Ed. 1767, 334 U. S. 843, 68 S. Ct. 1511.

Division One says in its opinion:

> "It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions unless its enactment is within the police power of the State."

So if it can be justified at all, it must be based on the valid exercise of the police power. I recognize that while "police power" cannot be definitely and briefly defined in [fol. 102] such a way as to embrace all sets of facts that might face the courts, yet a general definition is epitomized in C. J. S. as follows:

> "Police power is the exercise of the sovereign right of a government to promote order, safety, health, *morals*, and *the general welfare of society*, within constitutional limits." (16 C. J. S. Constitutional Law, Sec. 174.)

If Section 11785 (129.060 R. S. Mo. 1949) is to be held within the police power, it certainly would be under "morals" or "the general welfare of society." But section 196 of C. J. S. Constitutional Law, tersely states "The exercise of the police power is subordinate to constitutional limitations thereon."

So far as we have been cited, or I have been able to find from an independent investigation, the first and leading case in the United States directly on this question is the case of People of the State of Illinois vs. Chicago, Milwaukee and St. Paul Railway Co., 306 Ill. 486, 138 N. E.

155, 28 A. L. R. 610. An annotation at the end of that case in A. L. R. confirms my opinion that it is a case of first impression. In that case the Supreme Court of Illinois had under consideration a statute almost identical with the one before us except it permitted the employee two hours absence instead of four. That Court said:

> "Under our state and Federal Constitutions every person is guaranteed the equal protection of the law in the right to own, use, and enjoy property. These Constitutions also distinctly provide that the property of no person shall be taken unless compensation be given to him for such invasion of his rights. Any law that deprives any person of his property or compels him to deliver to any person his property without justification deprives him of property without due process of law. The section of the statutes above quoted violates the provision of our Constitution aforesaid by providing, in substance, that no deduction from the usual salary or wages of the employee shall be made by his employer on account of such absence, and by subjecting the employer to the penalty aforesaid in case he makes such deduction from the employee's wages. There is no justification or sound reason to be found in the law for making such a discrimination between [fol. 103] an employer of labor and other persons who do not employ labor, and it likewise is a clear violation of the due process clause of the 14th Amendment to the Federal Constitution. The legislative branches of this government and of this state have gone to the utmost limits in legislation to protect the lives, health, and safety of employees, and the courts of this country, including this court, have also gone far in sustaining those laws wherever and whenever it reasonably appeared that such laws were necessary or beneficial in protecting the lives, health, and safety of such employees while at work, without regard to the question of cost to employers. The same courts have gone equally far in sustaining laws that guarantee the equal and untrammeled right of every citizen to exercise his right of franchise and to cast his vote at every election as he pleases and for whom he pleases, and without

hindrance or undue influence of any kind by any person; but, so far as we know, no court has ever decided in any case that it was the right of any citizen, under any circumstances, to be paid for the privilege of exercising his right to vote, or to be paid by his employer for the time employed by him in the exercise of his right to vote. The statute in this case, in substance, requires employers of laborers to pay them for two hours' time while exercising their right to vote, and thus deprives such employers of their money and property without due process of law, and thereby denies them the equal protection of the laws, in violation of both the Federal and State Constitutions."

The State of Illinois in this case argued, as is argued here, that this statute was a valid exercise of the police power but that contention was considered by the court and it said:

"It is true that the state does have the right, under its police powers, to pass laws that tend to promote the health, safety, or morals of such employees as Turney, because of the fact that such laws would tend to promote the health, comfort, safety, and welfare of society. The act in question, as contended by plaintiff in error, does not in any way, so far as we are able to [fol. 104] see, tend to promote the health, safety, or morals of such employees. The provisions in question are not adapted to the object for which the law was enacted, and cannot be said to secure public comfort, welfare, safety, or public morals. There is no contention, and there can be none made with any reasonable showing, that the provision in question tends to promote the safety or health of any employee. It has always been the policy of our laws to condemn the idea of any voter being paid for exercising the privilege of an elector or voter. The right to vote is simply one of the privileges guaranteed to every citizen of this country who possesses the requisite qualifications. It is not only a right but should be regarded as a duty of the citizen, where he is reasonably able physically to perform that duty. It is not the constitutional right

of any citizen to be paid for the exercise of his right to vote, and the holding of the provision of the statute void does not violate the right of any citizen, including those who are employed to labor. This provision of the statute is not sustainable under the police power of the state, and it does violate the constitutional provisions aforesaid, and therefore must be declared void. Besides, 'no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection' of the laws, and it should not 'override the demands of natural justice.' "

In the case of McAlpine vs. Dimick, 326 Ill. 245, 157 N. E. 235, the question was again before the Supreme Court of Illinois and that court reaffirmed its doctrine in People vs. Chicago, Mil. & St. Paul Railway Co., Supra, saying:

"The provision of section 7, giving employees the right to absent themselves from their employment for two hours on election day for the purpose of voting without any deduction from their salaries or wages on account of such absence is also unconstitutional, being a violation of section 2, article 2 of the Constitution."

If it was unconstitutional then, it is now. The Constitutional provision and the statute remain the same. A valid [fol. 105] exercise of the police power cannot transcend the Constitution.

In Zelney vs. Murphy, 387 Ill. 492. 56 N.E. (2) 754, which was a suit for unemployment compensation, the court mentioned the case of People vs. Chicago, Milwaukee and St. Paul R. R. Co. and said:

"The statute there, as questioned, provided a penalty for any employer who made a deduction in wages for a period of two hours used by such employee in voting at any general or special election and the court held that it was not the constitutional right of any citizen to be paid for the time consumed in exercising the right to vote. The court further said: 'No exercise of the police power can disregard the constitutional guaranties in

respect to the taking of private property, due process and equal protection of the laws. This holding was approved in McAdping v. Dimick, 326 Ill. 240, 157 N.E. 235. However, this statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."

The fact that the statute has been re-enacted and amended, placed and maintained, on the statute books and apparently never enforced, does not make it constitutional. The statute in this state was enacted more than 50 years ago and the fact that there are no decisions on it until now does not inferentially or otherwise tend to prove its constitutionality. More likely it proves that there has never been any attempt to enforce it. The case at bar seems to be the first one, as far as the books show, where this State has endeavored to punish an employer for refusing to pay an employee under these circumstances. And I can find no attempt on the part of any employee to collect such, as it appears to me, unrighteous compensation. I had rather believe that absence of precedent is due to the fact that the workers of Missouri have resented the legislative implica-[fol. 106] tion that they will not exercise that privilege of free men without being paid for it. I had rather think that in their scales the right to vote outweighs a few hours pay.

In Illinois Central Railway Company vs. Commonwealth, 305 Ky. 632, 204 S.W.(2) 973, the same question was up and that court held it unconstitutional both under the Kentucky Constitution and the Constitution of the United States. As I read that opinion, it did not base its decision upon the People vs. Chicago, Milwaukee, St. P. R. Co. Supra, but after it had discussed the statute, its reasons for holding it unconstitutional, and then declaring its unconstitutionality under the Kentucky Constitution, it said this:

"We also believe that the wage-payment-for-voting-time provisions of this statute are antagonistic to the

United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law.

"So far as we know, there has been only one case of this exact character decided by any court of last resort in the United States, The holding of that case was that such a law as this one now under consideration, passed by legislative authority in the State of Illinois, could not meet constitutional standards and must accordingly fall in the face of the fundamental restrictions of organic law. See People v. Chicago, M. & St. Paul Ry. Co., 306 Ill. 486, 138 N.E. 155, 28 A.L.R. 610."

It seems to me that this question here boils itself down to this proposition, can the legislature, without violating the provisions of the Constitutions, compel an employer to pay wages to his or its employee for four hours, or any other amount of time, that he absents himself on election day and for which he gives his employer no service?

It is the duty of every good citizen to vote. On that day, and only then, he stands equal with every other citizen. Of course, the employer should not be permitted to deprive him of this duty by refusing to let him leave the place of his [fol. 107] employment. To penalize him if he does is certainly a valid exercise of the police power and promotes the general welfare of the country in increasing the number of voters and thereby make the questions to be determined at the polls represent the voices of a greater number. But to require the employer to pay him while absenting himself on election day (or for going to the polls to vote although the statute does not require that) does not promote the morals of the citizens but in my judgment, has the opposite effect. To pay a voter for going to the polls to vote is the first step toward corruptly influencing him to vote a certain way.

What benefit does the employer receive by the employee voting that is different to the benefit that the voter himself receives or any third person interested in a fair expression of opinion at the polls? He benefits no more than anyone else, including the employee. It certainly does not indicate

high morals on the part of a citizen to abstain from going to the polls unless somebody pays him, or unless he can do so without losing a small amount of wages. As a matter of fact, this employee, as most employees in this modern age of the eight hour day, had plenty of time either before going to work or after quitting time to cast his ballot without interrupting his service to his employer.

All good citizens should exercise the privilege of voting. It should be exercised voluntarily without any strings attached. He should desire on this day to be equal with all other citizens without any influence from any source except his own considered judgment of the candidates to be selected or the issues to be decided. If he receives pay for voting, he must feel a certain sense of obligation to the payor. It has always been the policy of a democracy to condemn the hiring of people to vote, to the end that the manner of marking their ballot would not be corruptly influenced.

It might be argued that it would be for "the general welfare" and foster more amicable relations between the employer and employee, if the statute is followed and the employer pays the employee. Such a feeling could be based only upon a sense of obligation which would restrict the free exercise of the right to vote according to one's own lights.

[fol. 108] But it is more likely that the employee, so paid, would not attribute this benefaction to his employer but the enforcement of the statute would transmute loyalty to the employer into gratitude to the legislature. In either event, the result would not be beneficial to the general welfare.

It will be noted that this statute does not apply to certain elections, it applies to all elections and the only requirement is that it be an election in which the employee is "entitled to vote". The sole object of the Corrupt Practice Acts of the various states and nation is to procure a free expression in the voting booth. The voter should go there voluntarily and in theory, at least, express his honest convictions on the candidates and issues. He should not go there as the hired hand of his master on the time that his master is compelled to pay for, in exercising his privileges as a citizen. To require his employer to pay him for voting or pay him for the absenting of himself from his job, so he may vote is, in

my opinion, immoral in itself and at variance with this country's policy of free and unhampered elections. The general welfare of the state will be best conserved if the voter exercises his right to vote on his own time uninfluenced by the feeling that he is an employee in his master's service and on the payroll at the time he is doing that which he should only do as a citizen. This privilege should not be measured in dollars.

There are also cases which seem to hold that such statutes are justified as a valid exercise of police power. They are: People vs. Ford Motor Co. 271 App. Div. 141, 63 N.Y.S. (2) 697. Kouff vs. Bethlehem-Alameda Shipyard, Inc. (Cal. App.) 202 Pac. (2) 1059. Lee vs. Ideal Roller & Mfg. Co. 92 N.Y.S. (2) 276. Ballarina vs. Schlage Lock Co. (Cal.) 226 Pac. (2) 771.

The cases to the contrary in my opinion are not as well reasoned and logical as the ones above referred to.

In People vs. Ford Motor Co., 271 App. Div. 141, 63 N.Y.S. (2) 697, the Company was convicted and fined $100.00 on each of three counts for subjecting employees to a reduction of wages because of absence from work, while exercising the privilege of attending an election.

The majority opinion did not discuss the constitutionality [fol. 109] of the statutes. It was discussed, however in a lengthy and well reasoned dissenting opinion by Lawrence, J., and at the close of that opinion, he said:

> "So far as any case has been brought to my attention and so far as I have been able to discover, no court has decided that it is the right of any voter, under all circumstances, to be paid for the privilege of voting. The statute here requires employers to pay their employees for two hours of time while exercising the right to vote, whether that is necessary or not, and thus deprives them of their property without due process and denies them the equal protection of the law, in violation of both the federal and state constitutions."

In Kouff vs. Bethlehem-Alameda Shipyard, Inc. (Cal. App.) 202 Pac. (2) 1059, the question before the court was the legality of the discharge of an employee because he had taken off time to serve as an officer of election on election

day. It was held that the statutory requirement was not unconstitutional. The court cited and discussed People vs. Chicago, M. & St. Paul R. Co. supra and Illinois Central R. vs. Commonwealth, supra and said:

> "It is interesting to note that both cases concede that that part of the statute requiring employers to allow time out to vote—2 hours in Illinois and 4 in Kentucky—is a proper exercise of power. It was for a violation of the part requiring full pay that both railroads were prosecuted. Although those cases deal with time out for voting, while this deals with time out for election-board service, there is no essential difference between the statutory language in those cases and that of section 696 viz., 'nor shall any deduction be made from his usual salary or wages.' However, it is not necessary for us to express any opinion as to the constitutionality of the part of section 695 just quoted. It suffices to say that it is clearly separable from the dismissal provision. See 12 Ca. Jur. PP. 643, 644. If the state can prevent employers from discharging employees because they serve on election boards, it follows that the complaint states a cause of action for unlawful discharge."

[fol. 110] In the case of Lee et al vs. Ideal Roller & Mfg. Co. 92 N.Y.S. (2) 276, the cause was tried in the municipal court, Scileppi, Justice, presiding. The facts in that case were dissimilar to the one here. In that case an employee had worked 38 hours in a week and had been paid for 40 hours because of two hours off on election day. He was then called upon to work 4 more hours on Saturday after he had only worked 38 hours but had been paid for 40. Under a Union contract for overtime above a 40 hour week, he was to receive time and one-half. He contended that the two hours for which he was paid and did not work should be counted in the 40 hour week so he could get time and one-half for the full four hours worked on Saturday. His employer contended otherwise but Scileppi, Justice, held for the employee and rendered judgment against the defendant for the 4 hours worked on Saturday at overtime wages. No case is cited in the opinion as authority, no constitutional

question was discussed and the only issue was whether to count the two hours that were paid for that were not worked in the 40 hour week so the full four hours on Saturday would be paid at the overtime rate. In its opinion, Scileppi, Justice, said:

> "It is conceded by the defendant that if the plaintiffs had actually worked eight hours on Election Day, with two additional hours off to vote, the plaintiffs would be entitled to two hours pay at overtime rate for that day."

This case is therefore not in point here.

In Ballarina vs. Schlage Lock Co. 226 Pac. (2) 771, the Appellate Department, Superior Court, City and County of San Francisco, California was considering a statute in all essentials the same as ours. This statute had been enacted in 1881 and until November, 1950 had never been before the courts. It permitted every voter at every general, direct primary or presidential primary election to be absent from his employment for two consecutive hours between the time of opening and the time of closing the polls. It provided that he should not be liable to any penalty "nor shall any deduction be made on account of any such absence from his usual salary or wages." This case never pretended to separate the two elements of the statute that is, the right to be absent and the right to be paid. It merely stated that [fol. 111] when persons enter into a contract, all material statutes affecting it are read into the contract by the law. That, in the abstract, is a true statement but it has this exception, that it does not apply to an unconstitutional statute or part of one. The court then held that this statute taken as a whole was a valid exercise of police power and became a part of every contract entered into between employer and employee after its enactment.

I am not much impressed with the argument of appellant about the loss of production. When it entered into its contract with the employee, whether actually written into it or not, that contract included the provisions of all *valid* material statutes. 17 C. J. S. Contracts, Sec. 330. When it contracted with its employee, it knew that on election days he was entitled to a leave of absence for four hours between

the hours of opening and closing of the polls. In my judgment, that provision went into the contract, was a part of it, was a valid exercise of the police power and any loss occasioned by it because of the non-productivity of its plant was nothing about which it could complain. But to take money from the pocket of the employer whether it be $2.40 for an hour and one-half or the same sum multiplied by the number of its employees, is taking the property of one segment of society and giving it to another without anything in return and this without considering the immoral aspect of paying an employee for exercising his privilege and duty to vote. That part of the statute was unconstitutional and did not become a binding part of the contract. People vs. Coler, 59 N. E. 716, 166 N. Y. 1, 82 Am. S. R. 605, 52 L. R. A. 814, Affirmed, 67 N. Y. S. 701, 56 App. Div. 98; Cleveland vs. Clements Bros. Const. Co., 65 N. E. 885, 67 Ohio St. 197, 93 Am. S. R. 670, 59 L. R. A. 775.

In the case written by the St. Louis Court of Appeals (State vs. Day-Brite Lighting, Inc., 220 S. W. (2) 782), it was merely held, as to the matter now in question before this court, that the information charged an offense under the statute. It construed the statute as it found it, and did not pretend to pass (as indeed it could not) upon its constitutionality. I have no disagreement with its holding that the right for an employee to absent himself from his employment, and the penalizing of an employer if he prevented [fol. 112] him from the "exercise of such privilege," is within the valid exercise of the police power of the state.

An employer is deprived of his property without due process of law and denied the equal protection of the laws if he is compelled to pay wages during the absent period, where no services for the employer is performed and where the period of absence is for the benefit and convenience of the employee. Such a violation of an employer's rights cannot be hallowed by the police power.

William L. Vandeventer, Judge.

Conkling, J., concurs.

[fol. 113] IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY OF FILING MOTION FOR REHEARING—June 26, 1951

Comes now the appellant, by attorney, and files herein a motion for rehearing and suggestions in support, with service, in the above entitled cause.

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IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—July 9, 1951

Now at this day, the court having seen and fully considered appellant's motion for a rehearing in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

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IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER STAYING MANDATE—July 21, 1951

Comes now the appellant, by attorney, and files and presents to the court its motion to stay the mandate in the above entitled cause, which motion is considered by the court and sustained.

[fol. 114] [File endorsement omitted]

IN SUPREME COURT OF MISSOURI

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI TO THE SUPREME COURT OF THE UNITED STATES —Filed August 14, 1951

To the Chief Justice of the Supreme Court of the State of Missouri:

The Day-Brite Lighting, Inc., your petitioner, respectfully shows:

1. Petitioner is the Appellant in the above entitled cause.

2. The State of Missouri, the above named Appellee, filed an information in the St. Louis Court of Criminal Correction, St. Louis, Missouri, on the 25th day of June, 1947. The information charged your petitioner with the commission of a misdemeanor, a criminal offense, to-wit:

"That the Day-Brite Lighting, Inc., a corporation, in the City of St. Louis, on the 5th day of November, 1946, being a day set aside for the holding of an election in said City and State, and being then and there the employer of Fred C. Grotemeyer, who was a person entitled to vote at said election, and who was entitled to absent himself from his work and employment for a period of four hours between the times of opening and closing of the polls without penalty of deduction of wages because of the exercise of such privilege, did wilfully and unlawfully penalize the said Fred C. Grotemeyer, their employee, by deducting from his salary the amount of his earnings for the time he was absent from his work, in the exercise of such privilege, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State."

[fol. 115] 3. Your petitioner was found guilty at a trial held on the 20th day of November, 1949, and on the 2nd day of December, 1949, it was sentenced to pay to the Respondent a fine of One Hundred Dollars and costs.

4. An appeal from this judgment and sentence was taken by your petitioner, and said judgment and sentence was affirmed by Division I of the Supreme Court of Missouri on November 13, 1950. A motion for rehearing or, in the alternative, to transfer the cause to the Supreme Court en banc because of the Federal Constitutional Question involved was duly filed, and Division I of the Supreme Court of Missouri, while overruling the motion for a rehearing, did transfer the cause to the Court en banc.

5. The Supreme Court of Missouri en banc, by a 4 to 3 decision, on the 11th day of June, 1951, adopted the opinion of Division I of the Supreme Court of Missouri, thereby upholding the validity of that section of the statutes of the State of Missouri under which your petitioner was convicted and which section your petitioner has alleged and now alleges is repugnant to the Constitution of the United States; and thereafter your petitioner duly applied for a rehearing which was denied by the Supreme Court of Missouri en banc on the 9th day of July, 1951.

6. Your petitioner respectfully states by this petition and as is shown by the assignment of errors filed herewith, that in said cause there is drawn in question the validity of a statute of the State of Missouri, namely, Section 129.060, R. S. Mo. 1949, on the ground of said statute being repugnant to the Constitution of the United States in that this petitioner's conviction under the provisions of said Section 129.060, R. S. Mo. 1949 deprives this petitioner of its property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United [fol. 116] States, denies this petitioner of equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and impairs the obligation of contract in violation of Section 10, Article I of the Constitution of the United States, and the decision is in favor of its validity.

7. Your petitioner further respectfully states by this petition and as is shown by the assignment of errors filed here-

with that in said cause there is additionally drawn in question the validity of a statute of the State of Missouri, namely, Section 129.060 R. S. Mo. 1949, on the ground of such statute being repugnant to the Constitution of the United States in that this petitioner's conviction deprived it of its property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States, when all of the facts alleged in the information filed in this case and based on the provisions of said Section 129.060 R. S. Mo. 1949 were not sufficient to accuse or convict this petitioner of the commission of any crime; and, when all the facts stipulated in evidence and before the Court showed this appellant had not violated the provisions of said statute, the conviction of this appellant deprived it of its property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States; and, when the facts alleged in the information filed in this case, which was based on said Section 129.060 R. S. Mo. 1949, were not sufficient to accuse and convict this appellant of the commission of any crime, the conviction of this appellant denied it the equal protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and, wher all of the facts stipulated in evidence and before the Court showed that the appellant had not violated the provisions of Section 129.060 R. S. Mo. 1949, the conviction of the appellant denied it the equal [fol. 117] protection of the laws contrary to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision aforesaid is in favor of the validity of said section.

8. Your petitioner avers that Section 129.060 R. S. Mo. 1949 has not expired by its own limitation and has not been altered or repealed by law.

9. Your petitioner, therefore, desires to avail itself of the law in such case made and provided by appeal to the Supreme Court of the United States.

Wherefore, this petitioner prays for an allowance of an appeal from said Supreme Court of the State of Missouri to the Supreme Court of the United States and for such other and further process and proceedings as will enable it to

obtain a review of the case by the Supreme Court of the United States and a reversal of the decision of the Supreme Court of Missouri, and also prays that an order be made fixing the amount of security which petitioner, as Appellant, shall give and furnish upon said appeal; and that upon the giving of said security, all further proceedings in this Court be suspended and stayed until the determination of said appeal by the Supreme Court of the United States; and that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Missouri, may be sent to the Supreme Court of the United States, as provided by law.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri, Cobbs, Blake, Armstrong, Teasdale & Roos, Thomas H. Cobbs, Robert E. Blake, Henry C. M. Lamkin, 509 Olive Street, St. Louis, Missouri, by Henry C. M. Lamkin, Attorneys for Petitioner and proposed Appellant.

[fols. 118-119] Bond on appeal for $500.00 approved and filed August 14, 1951 omitted in printing.

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[fol. 120] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed August 14, 1951

Comes now the said Day-Brite Lighting, Inc., Appellant, and in compliance with Rule 9 of the Rules of the Supreme Court of the United States, assigns the following errors in the record and proceedings in the said case:

1. In said suit there was drawn in question the validity of a Statute of the State of Missouri numbered 11785 R. S. Mo. 1939, Vol. II, page 3071, (the said section being then and there part of an Act known as the "Corrupt Practices

in Election Act" and the particular sub-section, namely, Section 11785 R. S. Mo. 1939, being entitled "Employees to be allowed four hours (to vote)—penalty, etc.", approved in 1897), on the grounds that it was repugnant to the Constitution of the United States and specifically Article I of the Fourteenth Amendment thereto, Section 10, Article I of said Constitution, and the Fifth Amendment thereto, and the decision of the Supreme Court of the State of Missouri was in favor of the validity of said Statute, which decision is hereby assigned as error. (The statute, under the revision of 1949, is now Section 129.060 R. S. Mo. 1949, Vol. 1, page 1253, and the Act is now known as the "Corrupt Practices and Offenses Relating to Registration and Elections". [fol. 121] The Statute in question, however, was not changed by the revision. The 1949 citation will be used herein hereafter.)

2. That the Supreme Court of Missouri erred in holding and deciding that forcing an employer to give to an hourly paid employee money for time not worked during his regularly scheduled work day, but time used by the employee so that the said employee would have the statutory four hour period during the time the polls were open in which to vote, was not a deprivation of Appellant's property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of Missouri erred in holding and deciding that forcing one class of persons, natural or corporate, to pay a member of one special group of the electorate of the State of Missouri and of the United States, for time missed from his regular employment in order to vote, did not deny this Appellant equal protection of the law contrary to Section 1 of the Fourteenth Amendment of the United States.

4. The Supreme Court of Missouri erred in finding and holding that forcing one party to a contract to pay to the other party to a contract the hourly rate contractually agreed on between the parties to be paid for each hour the second party worked, even though the second party did not do any work during the period in question, was not an abrogation of the obligation of contracts in contravention of

Section 10 of Article I of the Constitution of the United States.

5. The Supreme Court of Missouri erred in holding and deciding that the Day-Brite Lighting, Inc. was guilty of violation of the provisions of Section 129.060 R. S. Mo. 1949 when the acts of this Appellant alleged in the information filed in this cause did not constitute a violation of any [fol. f22] section of the laws of the State of Missouri, and in particular Section 129.060 R. S. Mo. 1949, and hence this Appellant by such conviction was deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States.

6. The Supreme Court of Missouri erred in holding and deciding that the Day-Brite Lighting, Inc. was guilty of violation of the provisions of Section 129.060 R. S. Mo. 1949, when all the evidence produced at the trial did not show any violation of said section, and hence this Appellant by such conviction was deprived of its property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

7. The Supreme Court of Missouri erred in holding and deciding that the information filed in this case and based on Section 129.060 R. S. Mo. 1949 contained facts sufficient to charge this Appellant with the commission of a crime, and hence this Appellant was denied the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of Missouri erred in holding and deciding that The Day-Brite Lighting, Inc. was guilty of the violation of the provisions of Section 129.060 R. S. Mo. 1949, when all the evidence produced at the trial did not show any violation of said section, and hence this Appellant by such conviction was denied equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, on account of the errors hereinabove assigned defendant-appellant prays that the judgment of the Supreme Court of Missouri, dated the 11th day of June, 1951 in the above entitled cause, be reversed, and judgment be

entered in favor of this Appellant, and for such other relief [fols. 123-134] as to the Court may seem just and proper.

Dated this fourteenth day of August, 1951.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri, Cobbs, Blake, Armstrong, Teasdale & Roos, Thomas H. Cobbs, Robert E. Blake, Henry C. M. Lamkin, 506 Olive Street, St. Louis, Missouri, by Henry C. M. Lamkin, Attorneys for Appellant.

[fols. 135-136] Citation in usual form showing service on J. E. Taylor omitted in printing.

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[fol. 137] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 14, 1951

The petition of Day-Brite Lighting, Inc., defendant and appellant in the above entitled cause for an appeal in the above cause to the Supreme Court of the United States, from the judgment of the Supreme Court of the State of Missouri, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of error and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that the appeal be and is hereby allowed to the Supreme Court of the United States from the final judgment dated the 11th day of June, 1951 (Motion for Rehearing overruled the 9th day of July, 1951), of the Supreme Court of the State of Missouri, as prayed in said petition, and that the Clerk of the Supreme Court in the State of Missouri shall, within 40 days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of this Court, a true copy of the material parts of the record herein, which shall be designated

by praecipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fol. 138] It is further ordered that the said Appellant shall give a good and sufficient cost bond in the sum of Five Hundred Dollars ($500.00), that said Appellant shall prosecute such appeal to effect and answer all costs if it fails to make his plea good, and that said bond, when filed and approved, shall stay the sending down of the mandate herein and of all proceeding in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated this 14th day of August, 1951.

Roscoe P. Conkling, Acting Chief Justice of the Supreme Court of the State of Missouri.

[fol. 139] Acknowledgment of Service (omitted in printing)

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[fol. 140] Clerk's Certificate to foregoing transcript omitted in printing.

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[fols. 141-143] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed October 15, 1951

Comes now Day-Brite Lighting, Inc., the above appellant, and, pursuant to Supreme Court Rule 12, Paragraph 9, adopts its Assignments of Error as its statement of Points to be Relied Upon and represents that the whole of the Record, as filed, is necessary for the consideration of the case, except the Appeal Bond.

Appellant states that a simple statement to the following effect: "Appellant filed an appeal bond in proper form and

the same was approved on August 14, 1951" will suffice in respect to the appeal bond.

Louis J. Portner, 509 Olive Street, St. Louis, Missouri; Robert E. Blake, Wm. H. Armstrong, Henry C. M. Lamkin, 506 Olive Street, St. Louis, Missouri, by Wm. H. Armstrong, Attorneys for Appellant.

Statement of Service (Omitted in Printing)

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[fol. 144] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

[Title omitted]

ORDER—November 5, 1951

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

(8680)